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HOLT'S INSURANCE LAW OF CANADA.

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A TREATISE

ON THE

INSURANCE LAW OF CANADA

EMBRACING

FIRE, LIFE, ACCIDENT, GUARANTEE, MUTUAL BENEFIT, ETC.

WITH

AN ANALYSIS OF THE JURISPRUDENCE AND OF THE STATUTE
LAW OF THE DOMINION

BY

CHARLES M. HOLT, L.L.L.
BARRISTER, MONTREAL BAR.

0
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Rec. Feb. 21, 1898.

TO
SIR HENRI JOLY DE LOTBINIÈRE, K.C.M.G.,
THE CANADIAN BAYARD,
“WITHOUT FEAR AND WITHOUT REPROACH,”
THIS BOOK IS RESPECTFULLY
Dedicated.

PUBLISHER'S NOTICE.

The subject matter of this work was first prepared by Mr. Holt in lecture form and delivered by him in the Law Faculty at Laval University. It has, however, since then been completely rearranged. As official Liquidator of the Glasgow & London (Fire) Insurance Company, and Attorney for Canada of the Life Association of Scotland, Mr. Holt has had an opportunity to examine both fire and life insurance from its practical side, and he has made a specialty of the subject in his law practice for some years past.

C. THEORET.

PREFACE.

There has been so much legislation and so many questions have come before our courts connected with Insurance that the writer believes that a complete review of the Insurance law of Canada as it stands to-day will be of use to the profession and to all those interested in insurance.

The writer's aim has been to make the work complete in itself, so that the labor of referring from it to statutes and reports will not be necessary.

To make it cover, in as brief a form as is consistent with clearness, the whole ground of the subject matter of insurance.

To give in digested form, with comments and notes, every legislative enactment on the subject of insurance of the Dominion parliament and of the legislatures of the provinces of Quebec, Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia and Prince Edward Island.

To make a careful analysis of the jurisprudence of the courts of each of the provinces and of the Supreme Court of Canada, and to deduce from it the general principles applicable to insurance contracts in Canada.

And lastly, to compare our Canadian legislation and jurisprudence with that of foreign countries and that of each province with the others.

The method followed in preparing the work was as follows : An examination was made of the legislation of the Dominion and of each of the provinces on the subject matter of insurance, and the jurisprudence in each province was then examined. From

these sources the writer has attempted to extract the general principles applicable to insurance contracts in Canada. The legislation and jurisprudence in foreign countries has also been examined, and a comparison made between the general principles applied abroad with those applicable in Canada.

The leading English and American decisions upon each point discussed have been placed in foot-notes; and the writer has endeavored to embody in the text, for the most part, the Canadian law alone.

MONTREAL, February, 1898.

C. M. H.

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LIST OF ABBREVIATIONS
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CANADIAN REPORTS AND REFERENCES.

A. R.....	Ontario Appeal Reports.
Can. L. T.....	Canadian Law Times.
C. C. L. C.....	Civil Code of Lower Canada.
C. P.....	Code of Procedure (Quebec).
Geld & Oxley.....	Nova Scotia Reports.
Grant's Chy.....	Upper Canada Chancery Reports.
L. C. J.....	Lower Canada Jurist.
L. C. L. J.....	Lower Canada Law Journal.
L. C. R.....	Lower Canada Reports,
L. N.....	Legal News (Montreal).
M. L. R., Q. B.....	Montreal Law Reports, Queen's Bench.
M. L. R., S. C.....	“ “ “ Superior Court.
N. S.....	Nova Scotia Reports.
N. W. T. Rep.....	North West Territories Reports.
Ont. P. R.....	Ontario Practice Reports.
O. R.....	Ontario Reports.
Pugs.....	New Brunswick Reports.
Q. B. R.....	Queen's Bench Reports (Quebec).
Q. L. R.....	Quebec Law Reports.
Q. R., Q. B.....	Quebec Official Reports, Queen's Bench.
Q. R., S. C.....	“ “ “ Superior Court.
R. C.....	Revue Critique.
R. de J.....	Revue de Jurisprudence.
R. L.....	Revue Legale.
Rev. de Leg.....	Revue de Legislation.
R. J. Q.....	Rapports Judiciaires de Quebec.
Russ & Geld.....	Nova Scotia Reports.
R. S. C.....	Revised Statutes of Canada.
R. S. M.....	“ “ “ Manitoba.
R. S. O.....	“ “ “ Ontario.
R. S. Q.....	“ “ “ Quebec.
S. C. R.....	Supreme Court Reports, Canada.
U. C. C. P.....	Upper Canada Common Pleas.
U. C. Q. B.....	“ “ “ Queen's Bench.

A TREATISE ON THE INSURANCE LAW OF CANADA.

CHAPTER I.

HISTORY OF THE CONTRACT OF INSURANCE.

1. RESEARCHES AS TO ANTIQUITY OF INSURANCE.

2. NO TRACE OF INSURANCE CONTRACT IN ROMAN LAW.

3. REASON FOR MISTAKEN INFERENCES.

4. MUTUAL INSURANCE AND THE ANGLO-SAXON GUILDS.

5. FIRST AUTHENTIC TRACES OF INSURANCE.

6. FIRST APPEARANCE OF LEGAL WORKS ON INSURANCE.

7. CONDITION OF CAPITAL IN MIDDLE AGES.

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9. ORIGIN OF FIRE INSURANCE AND SHORT SKETCH OF SAME IN THE PRINCIPAL COUNTRIES.—FIRST PROJECT OF FIRE INSURANCE IN ENGLAND—UNITED STATES—GERMANY—FRANCE—OTHER COUNTRIES.

10. ORIGIN OF LIFE INSURANCE AND SHORT SKETCH OF SAME IN THE PRINCIPAL COUNTRIES.—ENGLAND—UNITED STATES—GERMANY—FRANCE—OTHER COUNTRIES.

11. ACCIDENT INSURANCE—GREAT BRITAIN—UNITED STATES—GERMANY—FRANCE—OTHER COUNTRIES.

12. AGRICULTURAL INSURANCE—HAIL-STORM—LIVE STOCK.

13. DIVISION INTO THREE GENERAL GROUPS.

14. COUNTRIES REGULATED BY ENGLISH LAW—GREAT BRITAIN—CANADA—UNITED STATES.

15. COUNTRIES REGULATED BY FRENCH LAW—FRANCE—BELGIUM—NETHERLANDS—ITALY—SPAIN—PORTUGAL—GREECE AND ROUMANIAN PROVINCES—TURKEY AND EGYPT—CHILI—ARGENTINE REPUBLIC—URUGUAY AND PARAGUAY—BRAZIL—MEXICO—SALVADOR—NICARAGUA—COSTA RICA—NEW GRENADA—VENEZUELA—PERU—BOLIVIA—HAYTI—SAN DOMINGO—GUATEMALA—HONDURAS.

16. COUNTRIES UNDER GERMAN LAW—GERMANY—PRUSSIA—OTHER GERMAN STATES—SWITZERLAND—AUSTRIA—HUNGARY—RUSSIA—SWEDEN—NORWAY—DENMARK.

1. **Researches as to antiquity of insurance.**—The contract of insurance has been considered until lately to be of comparatively recent origin. The results of further investigations, however, if correct, seem to refute this idea and to confirm once

more the truth of the adage that there is nothing new under the sun. These investigations tend to show that the idea of insurance is of great antiquity and was carried out practically by the highly cultured people who inhabited at one time certain parts of Asia and from whom our present civilization and languages are derived. No traces, however, have been found to show that the system supposed to have been in vogue in those far off centuries was to any great extent similar to the present plans of insurance. The assertions made on this subject must be taken *cum grano salis* and they are reproduced here as being of historical interest only.

A letter which appeared in the London "Times" some years ago, signed "Cantab," refuted the statement made by Dr. Adler that the earliest notice of insurance is to be found in the Talmud. According to the writer of this letter, the practice of insurance was common in India for many centuries before the beginning of the Christian era. In the "Manava-dhar-masastra," or "Institutes of Mana," it is referred to incidentally as a well-known charge in the transit of goods, to be taken into account in estimating the tax that was to be levied on the trader. The Sanskrit word equivalent to our "insurance"—"yoga kshema"—is very ancient; it has been explained by Grassmann as "Erwerb und Besitz"—"acquisition and possession"—but more probably it meant property held by an assured, or full legal tenure; and hence its use in a later period as a law term, equivalent to "a contract between two parties by which one undertakes to guard, or insure, any property or even the life of the other, for a certain consideration."¹

According to Stewart, the earliest application of fire insurance was in connection with communes of towns and districts. These communes flourished in Assyria and the East more than 2,500 years ago. Judges, priests and magistrates were appointed for each town and district, with power to levy contributions upon each member of the commune to provide a fund against sudden calamities, such as drought and fire. If the judges were satisfied that the fire was accidental, they empowered the magistrates to assess the members of the commune either in kind or in money, and in the event of any member being unable through poverty to meet his share of the contribution, the deficiency was made up from the common fund. These communes still exist in a modified form in

¹ Belton, Fire Insurance Companies, p. 3.

China. In some towns of Russia the inhabitants are jointly responsible for accidental fires, and the government make enforced contributions according to the status and wealth of the inhabitants of the town or village. These communists had and have nothing in common with the communism of the present day, which signifies the negation of private property.¹

2. No trace of insurance contract in Roman law.—There is no mention of the contract of insurance in the Roman law, and there is no good reason for believing that it was ever in use among the Romans. That warlike and ambitious people seem to have prosecuted navigation with a view to conquest alone, leaving commerce, a subject of inferior consideration to themselves, to be carried on by their freedmen and slaves. A passage in one of Cicero's letters has been adduced as evidence that the Romans knew this contract,² but the sense of the passage does not warrant the inference. And the same may probably be said of other passages from which attempts have been made to trace the contract further back than the 13th century.³

3. Reason for mistaken inferences.—Those who seek to draw these inferences seem to confuse one of the elements of insurance, indemnity, by a middle-man, for instance, who transports or stores goods belonging to another and is responsible to him for their safe-keeping, with the combined result of the two elements constituting the insurance contract of the middle ages, indemnity on a basis of mutual obligations, (the insured undertaking payment of premium and other conditions,) or the three elements composing the insurance contract of to-day, indemnity and reciprocity based on a scientific application of statistics gathered from past experience. Even in the *fœnus nauticum* there is no trace of insurance; the Romans seem to have had a dim conception that the *pretium periculi* of transportation might be estimated, that is all, and on this vague idea some speculative contracts were entered into.⁴

4. Mutual insurance and the anglo-saxon guilds.—Walford says that the first glimmer of the principle of mutual insur-

¹ Relton, p. 6. ² Cic. Ad. Fam. 2, 17.

³ Livy Hist. lib. 23, n. 49 et 25, c. 3. Suet c. 18. Lex. Merc. 103. 1 Alauzet 31. 1 Marshall Pre. Disc. 5. 1 Durer intro. Disc. DeLalande Contrat d'Ass. contre l'Incendie, § 5 & seq. 5 Pardessus 331. Chaufton, Ass. 1, 348.

⁴ Chaufton, i., 348 seq., and see infra § 18.

ance arises in connection with the Anglo-Saxon guilds, wherein the members made fixed periodical payments towards a common fund, whereby they secured each other against loss from "fire, water, robbery, or other calamity." Here we have an acknowledgment of the necessity of protection against fire, and an indication that the only means of protection available was by this means of mutual association for common objects of protection. It is important in this connection to note that guilds appear to have been very common among the ancient Greeks and Romans; and that their objects were almost identical with those of the guilds of the Anglo-Saxons of later date.¹

5. First authentic traces of insurance.—Maritime insurance was naturally the first to appear. It was probably introduced in Italy by the Lombards in the 13th century. "Lombards" is the name given to certain Italians from Lombardy, residing in England early in the 13th century, who are supposed to have introduced insurance practice into that kingdom, and became the great money-lenders and underwriters of the world; so that policies written elsewhere were always expressed "to be made according to the custom of the Lombards, in Lombard street, London."²

Walford refers to the "Custom of Fumes," article xi. of the law promulgated in 1240 by the Count of Flanders requiring the whole town to pay a loss incurred by a house being secretly burnt.

In Ryley's "Memorials of London," 1868, p. 46, we find an agreement made by one Thomas Bat in 1302, to keep the city of London indemnified from peril of fire which might arise from his houses covered with thatch, and to have said houses covered with tiles within a stated time.

In the 14th century in the "Custom of Amsterdam," and the "Chronicle of Bruges," we find reference to an insurance organization and to an insurance chamber.³

The Act passed in 7th Parliament of King James I. of Scotland, 1427, entitled: "*The leave to merchants to sure their gudes*" relates, as far as the particulars given go, to protection from fire only.⁴

The ordonnance of Barcelona on insurance which reproduced

¹ Ins. Cyclo., iii., 438.

² Griswold, 90.

³ Chauffton, i., 350.

⁴ Relton, p. 8.

and amended prior ordonnances dates from 1485.¹ In 1522, Florence promulgated the famous statute of the Council of 100, followed by the ordonnances of 1523, 1526 and 1528.² Genoa and Naples also promulgated an ordonnance at that time, and insurance laws were enacted in Spain and Portugal under Phillip II., and in Holland under Charles V. and Phillip II.; all of which is sufficient evidence that marine insurance was generally known throughout Europe at that time.³

In the year 1574 a grant was obtained from Queen Elizabeth by one Richard Candler, mercer, to make and register all manner of assurances, etc., upon any ship, goods or merchandise, etc., within the city of London.⁴

In the Statute 43 Eliz. cap. 12 (1601), "*An Act concerning matters of Assurances used among Merchants*," the first passed in England affecting insurance associations, it was stated that marine insurance had been "tyme out of mynde an usage amongst merchantee both of this realme and of forraine nacyons," and under this act commissioners were appointed for hearing and determining causes concerning policies of assurance.⁵

In the reign of Charles II., (13, 14 Car. ii, cap. 23,) the powers of the commissioners were enlarged.

At a later date it was declared that the court was not competent to deal with life insurances—only with such contracts as related to merchandise (*i.e.*, marine insurance); besides, it only extended to actions by assured against assurers, and its decisions were no bar to actions respecting the same subjects in the common law courts.

Notwithstanding the above declaration, however, we find under article "Insurance," Chambers's Encyclopædia, vi., 175, 1890, a statement that the earliest life assurance policy of which particulars have been preserved, was made on 15th June, 1583, at the Office of Insurance within the Royal Exchange. When the person whose life was insured died, payment was disputed on the point whether the time for which the life was insured was 12 months of 28 days, or a full whole year. The commissioners ruled in favor of the latter interpretation and ordered the underwriters to pay.

¹ Pardessus, *Lois maritimes*. Paris, 1837.—Sacerdoti, *Il contratto d'assicurazione*. Padua, 1874.—Endemann, *Die Entwicklung des Assecuranzwesens*, *Deutsche Vierteljahrs-Schrift*, 1865, No. 112.

² These documents have been published by Baldasseroni in his treatise on *Marine Insurances*, vol. V. ³ Chaufon, i., 350. ⁴ Relton, 4 seq. ⁵ *Ib.*

This decision was upheld by two judges on an appeal to the Court of Admiralty.

That marine underwriters were an important class, and carried on an extensive business, may be judged from the following item of intelligence: "1615. There was here in London a merchant called Mr. Havers, who was a great assurer of goods (a common trade in the citty) and thereby he was growne vnto a good estate, and esteemed to be worth 30 or 40,000*l*."¹

6. First appearance of legal works on insurance.—In the 17th century the first legal works upon insurance made their appearance. The Portuguese Pedro Santerna and the Italian Benvenuto Straccha² wrote at this period.

7. Condition of capital in middle ages.—The principles of political economy then in vogue served to give an impulse to insurance; capital was considered essentially unproductive, and it naturally sought every means of evading this sterility. Marine insurance offered it an outlet of which, however, it availed itself so blindly, that the contract quickly degenerated into one of pure speculation. This is easily explained by the fact that insurance business was then transacted exclusively by individuals. Capital at that time was not permitted to make use of combination, and was devoid of any trace of such well tried systems and methods as now govern and regulate its use, multiplying its power manifold, and at the same time keeping it within the bounds of safety.

In olden times little was done in the way of investing funds, and money was generally kept in a chest. As an illustration of the chests of this period it is interesting to note that in the articles for establishing the "Hereditary" company upon 2000 lives, 1712, Article xiv says: That a strong and substantial iron cheet with a slanting till in the middle of it shall be bought, having five different locks and keys with different wards, which shall be fixed to the floor with screws from the inside of it, in the office of the company, to be absolutely immovable. Keys to be delivered to different trustees.³

¹ Relton, p. 46.

² Straccha in his treatise on assurances comments on the policy of Ancona of 1667, and quotes the law of Florence regarding all those points on which that policy was silent. ³ Relton, 384.

8. Formation of first companies for commercial purposes and marine insurance.—Holland was the first to remove the legal prohibitions against the employment of capital, and in 1602 the first stock company was formed there. The second followed in England in 1613. Efforts were then made to apply this new form of business association to insurance, but they were at first unsuccessful. A company founded in Holland in 1629, and another in France in 1668, did not prosper. It was in the 18th century only and in England that the organism of a stock company was successfully applied to insurance. A marine insurance company was formed there in 1720. Marine insurance companies were also formed at Copenhagen in 1726, at Stockholm in 1734 and at Berlin in 1765.¹

9. Origin of fire insurance and short sketch of same in the principal countries.—Apart from those more or less doubtful traces supposed to have been found in ancient history and recorded above, the origin of fire insurance seems to be more uncertain than that of marine insurance.

In Germany, some of the early guilds were converted into assurance associations. The "Feuer-Casse," at Hamburg, is said to be one of the earliest distinct fire insurance associations of which there is any knowledge. In 1591, several small "Brandgilden" entered into fire contracts for mutual insurance. These multiplied until, in 1676, it was determined to unite them all (Walford says there were about 46) into one "General-Feuer-Casse." It has undergone various changes since that time, and now embraces all the suburbs of Hamburg, as well as the city. Fire guilds also existed in Schleswig-Holstein, in the early part of the 15th century.²

Some of the very earliest proposals for insuring dwellings from fire (apart from guild or mutual schemes), although they were explained and understood with a degree of sagacity and clearness far beyond the time at which they were drawn up, were almost regarded as presumptuous schemes, wherewith providence might be tempted, and likely to excite injurious reflections on the party by whom the security was given. The first suggestion was made to Count Anthon Günther v. Oldenburg, in Germany, in the year 1609, but was not acted upon for the reasons stated above.³

¹ Chauffon, i., 351, 352. ² Relton, 7; Walford, *Ins. Cyclo.*, v. 388, 389.

³ Relton, 9; Beckmann's *History of Inventions*, Bohn's edition, 1846, vol. i., 241, 242.

Fire insurance has been described as the legitimate, though tardy, offspring of marine insurance.¹

Mr. F. G. Smith, in the article "Fire insurance," in the 8th edition of the *Encyclopædia Britannica*, says :

"Considering that marine insurance was well known, and insurance on life understood and practised to a certain extent in several mercantile countries by the middle of the 16th century, it appears extraordinary, when we call to remembrance the devastations and distress occasioned by fire in this country, that some means should not have been adopted at an earlier period to render such calamities less ruinous to individuals, particularly when a plan, which appears eventually to have formed the basis of the present insurance companies, was suggested so early as 1609." (Oldenburg, Germany.)

Schemes for a species of fire insurance in London were suggested in the years 1635, 1638 and 1660, but none were brought to maturity.

The most conclusive evidence that fire insurance had not begun to be practised in England in 1666, is probably to be found in the fact that no allusion has been traced in the accounts of the great fire of London, in that year, to the circumstance of any of the property having been covered by insurance; had such been the case, it would doubtless not have escaped notice. The amount of damage by that fire has been variously estimated at from £7,335,000 to £10,689,000. There can be no doubt that it was this calamity which led to the serious consideration of the subject of fire insurance and which resulted in the production of a scheme in the following year.²

Speaking on the question of fire insurance before 1666, Walford points out that the law-books would generally reveal the existence of contracts of this sort, for disputes will arise. But while numerous cases in regard to individual marine underwriting occur before this date, and some as to life insurance contracts, he could not, after painstaking search, discover any such case in regard to fire insurance. On the whole then he feels compelled to regard the belief in individual underwriting of fire risks in Great Britain prior to 1666 as extremely doubtful, and this opinion is confirmed by a paper issued by the Friendly Society in 1683, proposing a new way for securing houses from loss by fire. In the first

¹ Relton, 10. ² *Ib*, 11-16.

paragraph of this paper reference is made to the late conflagration, and it is distinctly stated therein that "those unfortunate persons were without any relief."¹

Beckmann, *History of Inventions* (Insurance), wrote in 1781 :

"A most useful imitation of marine insurance is the institution of insurance offices to indemnify losses sustained by fire. So far as I have been able to learn, companies for that purpose were first formed towards the middle of last century, though houses were insured by individuals much earlier."

Beckmann, in this statement speaks probably of Germany only.

The system of fire insurance for buildings in England began in 1667, that for goods at a later date.²

Kirkwood says : Mutual fire insurance clubs, granting insurances not exceeding £500 on a single risk, began to be formed the year after the great fire and continued for several years thereafter.

Walford, however, says that this is a delusion. He had studied advertisements in the papers from that date to the reign of Queen Anne, and though several contribution offices were founded, they all granted policies for particular sums, charged a premium, and collected proportions of loss when a fire occurred.³

8a. First project of fire insurance in England.—Dr. Nicholas Barbon, sometimes erroneously called Barton, one of the most enterprising and extraordinary men of his time, was the first projector of fire insurance in England, who brought his scheme to maturity. In 1667 he "set up" his office for insuring houses and buildings ; it was his personal business, a mere individual underwriting, as practised in regard to marine insurance. In the year 1680 it merged into "The Fire Office," of which he was the promoter and thus was founded the first joint-stock or proprietary company for fire insurance in London, and probably, in the world ; but it had no special legal or corporate powers and was regarded in the eye of the law as a mere partnership trading with a joint-stock capital. In 1705 it assumed the name of Phenix Office, but the date when it discontinued business is unknown. The present Phœnix Fire Office had nothing to do with the company just referred to and was not founded until 1782.

It was about the latter part of the 17th century that the

¹ Relton, 57.

² Ib, 18.

³ Statistical Journal, September, 1877.

system was established of each insurance office having a brigade to look after its own interests and to extinguish fires. It provided its men with liveries and badges.¹

In 1683 "The Friendly Society" for fire insurance on the mutual plan was started. Walford says that "before 1790 the business was reported to have merged into that of the Union of 1714, of which event, however, no trace can be found. There had been a number of serious fires in London in 1784-1786, and it is possible that by reason of these its funds had become exhausted."²

Another mutual society, called "Amicable Contributors" was established in 1696. About 1706 the name of "Hand-in-Hand" seems to have been applied to this office from its emblem, but according to Relton there is no evidence that the Amicable Contributors adopted that name till about 1713 or 1714.³

In his History of Fire Insurance, Cyclo. iii., 466, Walford says that in the "Post" of 24th August, 1707, it is stated that it was the practice of the Irish Peers "to insure their robes," but that it does not appear where or how this was managed. This notice, however, can only relate to insurance whilst in transit by sea between Ireland and England.⁴

The Sun Fire Office was established in 1710, the Union in 1714 and the Westminster in 1717. The London Assurance and the Royal Exchange were chartered for marine business in 1720, and in the following year their charters were extended to cover fire and life assurance business also.

A large number of other companies were founded in the last and current centuries in Great Britain, but it would be impracticable in a work of this kind to refer to them in even a superficial way. Fire insurance in Great Britain has assumed dimensions so vast that the foregoing extracts and statements must suffice for the purposes of this treatise.

9b. United States.—In the United States, one authority has it that the first insurance office in New England was established at Boston, in 1724.⁵

Hine, commenting on this, says⁶: "Probably only an office for individual underwriting; nothing known." Relton⁷ adds to this conjecture his opinion that it was for marine insurance. It is more than likely that he is right.

¹ Relton, 20 et seq. ² Id., 57. ³ Id., 71. ⁴ Id., 91.

⁵ His. Mag. and Notes, *re* Am., 1858, Boston.

⁶ Ins. Blue Book, New York, 1877. ⁷ p. 252.

"The Philadelphia Contributionship for the Insurance of Houses from Loss by Fire" was founded in 1752, and is supposed to be the first fire insurance company in America, Benjamin Franklin being the first director elected, although he had little to do with the establishment of the society.¹

9c. Germany.—According to Chaufton, fire insurance in Germany has been traced back to the time of peace and reparation which followed the Thirty-years-war,² but, as stated, insurance of buildings was practised long before that time by guilds or by the different states, provinces or municipalities. In 1779 a stock company was started in Hamburg for the insurance of movables, and in 1786 the Phoenix of London opened up a branch office in Hamburg.³ A large number of companies have been established in the course of this century, and English and Swiss companies also are doing a considerable business in that country.

9d. France.—Fire insurance in France began to be organized at the time the revolution broke out. Apart from an unsuccessful attempt in 1754, two companies were started in 1788, but they were swept away by the convulsions to which their country was subjected at that period. It was only with the *Restauration* that fire insurance was recalled to life, and a considerable number of companies were founded, many of which are still in existence. Incendiarism and fraudulent claims caused a crisis in 1845, but in the later and calmer times the companies recuperated themselves, and another series of new enterprises in fire insurance commenced after the war of 1870-71.⁴ The business at present is very extensive and as a whole is upon a sound basis.

9e. Other countries.—Fire insurance has also made great progress in Austria-Hungary, Switzerland and nearly all the other countries of Europe.

10. Origin of life assurance and short sketch of same in the principal countries.—In 1706, the Bishop of Oxford and others formed in England the first life insurance society, under the name of the Amicable Society.⁵ But it was not until 1765 that

¹ Relton, 252 et seq, Centennial Meeting of the Philadelphia Contributionship, 1852.

² Schmidt, Das Ganze des Versicherungswesens, 43.

³ Chaufton, i., 434, 435. ⁴ Ib, i., 413, 422.

⁵ Alauzet Ass., 102, citing Grun et Jolyat sur l'Ass.

the first insurance company transacting life business only, and on a scientific basis, was established, the Equitable of England, although two other companies, the Royal Exchange and the London Assurance, doing marine and fire business, had prior to that date, in 1721, opened up their life branches.¹ The remarks made in the preceding paragraph with regard to the extent of fire insurance in Great Britain also apply to life insurance in that country. These associations multiplied rapidly and the abuses which had caused the contract of life insurance to be prohibited in every other country (with the exception of Naples and Florence) led in England to the passing of the Gambling Act.²

10a. United States.—Life assurance in the United States commenced in the second half of the last century, but the first attempts were in a very crude shape and were rather mutual aid societies for the widows and orphans of clergymen than life assurance companies in the present sense of the term. These did not come into existence until the year 1812, when the Pennsylvania Insurance Company was established.³

10b. Germany.—With regard to Germany, life assurance was first attempted at Hamburg in 1806, but the Napoleonic wars of that period brought the company to a premature end; another attempt in 1823 failed, and success was attained in 1827 only, when the present "Gotha Life Assurance Bank" was constituted.⁴

It is hardly necessary to say that both in the United States and in Germany life assurance at the present time is transacted on a very large scale.

10c. France.—The only life assurance company which was launched in France in the last century, came to an untimely end after a few year's existence, the decree of 1793 suppressing all banking and life assurance institutions on the stock plan.

In 1819 life assurance was taken up again, but it made very little progress, and it was not until 1859 that public opinion changed in its favor. Since then a large number of companies have been established, and they transact a very considerable business.⁵

¹ Chauton, i., 352, 363 and Walford Ins. Cyc. Amicable Soc. and Ins. Guide and Handbook, 33, etc.

² 14 Geo. III. c. 48, and see Walford Ins. Cyclop. vo. Gambling ins. for interesting details on this point.

³ Chauton, i., 372 and 373. ⁴ Ib, i., 389. ⁵ Ib, i., 356-362.

10d. Other countries.—The development of life assurance in Austria-Hungary has been effected under great difficulties. The reason is to be sought in the wars and political crises which have troubled that country for a long time, and have prevented a prudent investment of the savings of the people. The first developments date from 1859; a feverish period of speculations and amalgamations was passed from 1872 to 1874, but now a state of calmness and stability seems to have been reached, and the companies of Austria-Hungary are in every respect the equals of those of the neighboring countries.¹

The first life assurance company in Switzerland was founded in 1841, on the mutual plan, but went into liquidation in 1855. Another mutual society was promoted in 1857, and was followed by the formation of three stock companies.²

11. Accident insurance.—Great Britain.—Accident insurance in Great Britain, as understood to-day, dates from 1848, and was much influenced by the building of the railways. Of the 15 companies projected from 1845 to 1850, only two came to be constituted, and they limited their operations to railway travelling. Real accident insurance was introduced by a third company, the Accidental Death Insurance Company, in 1850, which first, but unsuccessfully, appealed to the working and industrial classes, and then met with better success from the mercantile and professional classes. The Employers' Liability Act of 7th Sept., 1880, gave a great impetus to accident insurance.³

11a. United States.—In the United States, accident insurance was not known prior to 1847, in which year a company was formed for that purpose; it borrowed the statistics for the computation of its tariffs from an English source, as the tariffs of the American mutual aid societies were entirely empiric, as it were, and lowered or raised according to competition. Notwithstanding this scientific basis, however, the company was obliged to discontinue in 1853, owing to the frauds practised on it by the assured, often in collusion with unscrupulous physicians. Several other fruitless efforts followed before accident insurance was successfully launched in the United States.⁴

¹ Chaufon, i., 400.

² *Ib.*, i., 402; Max Wirth, *Allgemeine Beschreibung und Statistik der Schweiz*, Zürich, 1871, vol. i., 690; Ehrenzweig, 231.

³ Walford, *Ins. Cyclo.*, Accident insurance. Chaufon, i., 407, 408.

⁴ Hine, 63, 64. Chaufon, i., 409.

11b. Germany.—Insurance against accidents while travelling has long formed a branch of a number of life assurance companies in Germany, but insurance against other accidents can be said to have been called into existence by the Employers' Liability Law of 7th June, 1871, only, and it soon reached considerable dimensions. This law was the first enacted by any country to determine the indemnity due on account of injuries or death while in the employ of railway or mining companies, etc.¹

Accident insurance has undergone vital changes in Germany during recent years. Although private companies are still in existence and operate on a large scale, their province has been greatly curtailed since the introduction of compulsory insurance of all and every person employed in any kind of manual labor. This insurance, for which an intricate machinery throughout the empire has been put into operation, is entirely in the hands of the government and an elaborate classification of the different grades of risks has been compiled. In this system of compulsory provision for cases of accident the employer and employee pay each one half the premium, the employer advances the premium and deducts the share of the employee from his weekly wages. Payment of the premium has been simplified by the use of stamps, similar to postage stamps, which to the amount necessary in each case are pasted in a book bearing the name of the assured.

11c. France.—Prior to 1870 only one company transacted accident insurance business in France. Since 1874, however, a great number of companies have been started in that line, and fear is expressed that there are too many in the field to-day.²

11d. Other countries.—Insurance against accident has also made some progress in other countries of Europe, but, with the exception of one company in Switzerland and one in Belgium, it cannot be compared with the transactions in the countries referred to above.

12. Agricultural insurance. — Hailstorm. — Live stock. — Agricultural insurance, that is, indemnity for damage done to crops by hailstorms or the mortality of live stock, is in its infancy yet. In nearly every country, small mutual associations have been formed,³ but joint stock companies have hitherto taken up this branch of insurance to but a limited extent. The devastations of

¹ Chaufton, l., 409, 509. ² Ib, l., 404. ³ Ib, l., 468.

hailstorms peculiar to certain parts of some countries, and the frauds to which the insurance of live stock easily lends itself, have made the business little profitable, and have kept back capital from branching out in that direction as in the other fields of insurance.

Germany was the first to institute hailstorm insurance; a mutual society having been started there in 1797 and it still exists.¹

13. Division into three general groups.—It would seem that legislative enactments regulating insurance contracts may be divided into three general groups, namely those which have their source or which have arisen under the influence of the French, or the German, or the English laws respectively. The fact that these three have mutually influenced each other does not make against the truth of the proposition. French law undoubtedly impressed itself on all the European countries in the 17th, 18th, and the beginning of the present century. English law had great influence upon German law countries during a part of this century, and in its turn German law now exercises an influence upon the French law countries.²

In treating of the history of insurance law in foreign countries, we shall for the most part stop at the beginning of the present decade. A more exhaustive treatment, though interesting, would be beyond our province.

14. Countries regulated by English law.—Great Britain.—To treat first of the countries which may be said generally to be regulated by English law; in Great Britain itself the contract of insurance is regulated chiefly by the common law. The principal statutory enactments are the Gambling Act,³ an Act passed in 1867⁴ authorizing the transferee of a life policy to sue in his own name; an Act passed in 1870⁵ granting rights to married women in life insurance; and certain acts destined to prevent fires or facilitate their extinction.⁶ The laws affecting corporate bodies generally, also affect insurance companies in Great Britain.

14a. Canada.—In Canada we have in Quebec the enactments of the Civil Code drawn from the French Code de Commerce modified by the English common law. In the other provinces we have the English common law as modified by provincial legislation.

¹ Chauton, 471, and see Index as to Manitoba, *infra*. ² Chauton II., 21.

³ 14 Geo. III., c. 48. ⁴ 30-31 Vic., c. 144

⁵ 33-34 Vic., c. 93. ⁶ Bunyon Fire Ins., 5.

14b. United States.—In the United States also the common law is the basis of commercial law. Each state, however, has its own legislative enactments.

15. Countries regulated by French law.—France.—The law in France itself, apart from the dispositions of the Code de Commerce dealing with maritime insurance,¹ contains few texts dealing specially and exclusively with insurance. There is but one in the Code Napoleon,² which places it among aleatory contracts. Tax laws, however, relating to insurance are numerous.³ It is interesting to read the projects of law drafted in France to regulate by legislation the relation of insurer and insured. They throw light upon recent enactments in other countries.⁴

15a. Belgium.—In Belgium, in 1874, the Code de Commerce, passed in 1808 and based upon the French Code of 1807, was supplemented by a law upon insurance which provides fully for all branches of the subject.⁵

15b. Netherlands.—In the Netherlands insurance is regulated by the Wetboek van Koophandel of 1838.⁶

15c. Italy.—In Italy insurance was regulated from 1866 to 1883, by title VIII. of Book II. of the Codice di Commercio del Regno d'Italia, founded upon the French Code de Commerce.⁷ The new Italian Code of Commerce came into force in January, 1883. It treats fully of life, fire and other insurance.⁸

15d. Spain.—In Spain insurance is regulated by the Code of Commerce of 1829, which practically reproduces the provisions of the French Code,⁹ but it is silent as to fire and life insurance.

15e. Portugal.—Portugal has in its Code of Commerce dealt more completely with insurance than has the Spanish Code.¹⁰

¹ Tit. 9, 10, 11, 13 and 14, div. ii.

² Art. 1694, and see C. Com., art. 37, loi du 24 juillet, 1867. Decret du 22 Jan., 1863.

³ Loi du 28 avril, 1816, art. 51; 16 juin, 1824, art. 5; 5 juin, 1850, arts. 33, 48; 23 août, 1871, arts. 6-10. Decret du 25 Nov., 1871.

⁴ Chauffon, ii., 5. Grün et Jolyat, Journal des Ass., v. Dubroca, Rev. des Ass., ii. et iii. Lehir, Journal de l'assureur et de l'assuré, iv. et vi.

⁵ See the report of the Chamber of Representatives, by Van Humbeeck, Documents Parlementaires, 1872-1873, p. 23, and 1869-1870, p. 126; and see Namur's Code de Commerce Belge révisé, iii., pp. 1-115.

⁶ Chauffon ii., 44. ⁷ Id., 45. ⁸ Italian Code of Commerce, arts. 417-453.

⁹ Antoine de Saint-Joseph's Concordance entre le Code de Commerce Français et les Codes de Commerce étrangers, i., 1-128, and see Goldschmidt, Handbuch, 237. See also Acts of 1857, 1863, 1865, 1869 and 1870.

¹⁰ Portugese Code of 1833; arts. 1672-1812.

Its provisions on fire and life insurance are taken from the Code of Holland.¹

15f. Greece and Roumanian provinces.—Greece regulates the contract under its Code of Commerce of 1835, which is an exact reproduction of the French Code of Commerce.² In the Roumanian provinces insurance is regulated by the Code of Commerce of 1840, which reproduces almost without modification the dispositions of the first three books of the French Code of Commerce.³

15g. Turkey and Egypt.—Turkey by its Code of Commerce of 1864, provides for marine insurance. Its provisions are chiefly inspired by the French code, but it has borrowed from the Italian and Holland codes also, and from the Prussian Landrecht.⁴ In Egypt the Turkish Code of Maritime Commerce is in force.⁵

15h. Chili.—In Chili we find complete and carefully compiled provisions regulating insurance, and contained in the Chilian Code of Commerce of 1867. This code has been much admired, and has been pronounced by Mr. Goldschmidt to be “eines der durchdachtesten und anregendsten Gesetzbücher” (one of the best digested and most suggestive of codes), no light praise from such a critic for the legislators of this South American Republic.⁶

15i. Argentine Republic.—In the Argentine Republic the Code of Commerce of 1859-1862, less complete than the Chilian Code, treats of fire and life and other insurance.⁷ This code follows the plan of the Spanish Code, but borrows most of its dispositions from the Portugese Code. On some points, however, they have abandoned their model and brought their work well up to the later spirit of progress.

15j. Uruguay and Paraguay.—In Uruguay the Code of Commerce of 1866 regulates the contract. It is merely a revised copy of the Argentine Code (more properly the code of Buenos-Ayres) with this difference, that in the Argentine Republic the

¹ Midosi sur les sources de la législation portugaise, 1875, 168.

² Anthoine de Saint-Joseph, op. cit. ii., 304 and seq.; Goldschmidt, Handbuch, 249.

³ Anthoine de Saint-Joseph, op. cit. ii., 403-405; Goldschmidt, Handbuch, 251.

⁴ Goldschmidt, Handbuch, 255; Chaufton, ii., 74.

⁵ Goldschmidt, Handbuch, 256. ⁶ Ib, 286.

⁷ Mittermaier, Zeitschrift für Handelsrecht, vi., 119-141. 485-507.

policy is necessary to the perfection of the contract; and it is not so in Uruguay.¹ In Paraguay the Argentine Code was adopted in 1870.²

15k. Brazil, Mexico, Salvador, Nicaragua, Costa Rica, New Grenada, Venezuela, Peru, Bolivia, Hayti, San Domingo, Guatemala and Honduras.—In Brazil the *Codigo commercial do imperio do Brasil* of 1850 regulates insurance, and in the following countries the Spanish Code of Commerce has been reproduced:—Mexico in 1854; Salvador, 1855; Nicaragua, 1869; Costa Rica, 1850; New Grenada, 1853; Venezuela, 1862; Peru, 1853; Bolivia, 1834. In Hayti a code is in force which is a reproduction of the French Code, and was promulgated in 1826; and at San Domingo the French Code is in force. Lastly, in Guatemala and Honduras the ordonnance of Bilbao is still in force. This ordonnance was last revised under Philip V. in 1737.³

16. Countries under German law.—Germany.—To treat now of those countries in which the insurance law has its source in the German law, we find that in the German Empire itself the Code of Commerce of 1865 provides for maritime insurance only. The Prussian Code served as a basis for this work; outside of this the compilers drew upon the French code, the Code of Holland of 1838 and the Spanish Code of 1829.⁴ Side by side with this general law we find in each German State more or less insurance legislation, a license (Concession) from the Government being required to prevent as much as possible the establishment of bogus concerns; for this reason some States, Saxony for instance, do not admit a company from another German State unless it has given proof of its stability by having been successfully in existence in its native State for two or more years. No deposit, however, as in Canada and the United States is required.

16a. Prussia.—In Prussia the dispositions regulating fire and life insurance are very incomplete. In so far as regards life insurance, this is due to the fact that the *Allgemeines Landrecht* was promulgated under Frederick William II. in 1794, and that life insurance took root on the continent in 1806 only, at Hamburg. As to fire insurance the *Allgemeines Landrecht* could deal only

¹ Goldschmidt, *Handbuch*, 288.

² See the *Journal of Private International Law*, 1876, p. 178.

³ See Goldschmidt, *Handbuch*, 41; Chauton, *ii.*, 115.

⁴ See Makower—*Das allgemeine deutsche Handelsgesetzbuch*, Intro., 11 and 12.

with insurance on merchandise and other movable property. When it was drawn up, insurance on real estate was, and in some places still is, the exclusive province of public insurance companies (*oef-fentliche Feuer-Societæten*), and the legislator left this branch of insurance to be dealt with by the rules of these companies. In Berlin, for instance, every building, as soon as completed, must be insured with the Municipal Fire Insurance Society, private companies being allowed to cover the risk while the building is in course of construction only. On the other hand, insurance on movable or personal effects began from 1820 or 1830 only to develop to any extent. The law of 1837 was the chief of these developments and its main object was to lessen the temptation to incendiarism by preventing the over-insurance of movable effects (*Ueberversicherung*). In 1877, the rules of the *Feuer-Societæten*, which had proved so obnoxious and provoked so much conflict of jurisdiction were abrogated.¹ The control now exercised by the State in Prussia over fire insurance companies is regulated by their charters and by the general law of 1853. A rule of 1824 interdicted agents from soliciting insurance outside of their own residences, and this enactment was definitely abrogated in 1867. The law of 1869 regulates generally the relation between the State and the companies and that of 1866 imposes a government tax on policies graded in proportion to the amount of the premium. A similar tax is imposed in France.²

16b. Other German States.—In the different States forming part of the German Empire, we find, as a rule, as to fire insurance, a legislation less complete, but presenting the same characteristics as that of Prussia. In nearly all there are public insurance societies; in certain of the smaller States it is the *Feuer-Societæt* of a neighboring State which covers the ground. All these *Feuer-Societæten* have their special regulations, which vary from State to State, as in Prussia they vary from province to province.³ As in France, so in Germany, the efforts to enact a uniform legislation are interesting to the student of the history of insurance.

16c. Switzerland.—In Switzerland we find in the different legislations of the 22 cantons two strongly marked currents of influence. The French cantons have imitated or adopted the French legislation; the German cantons, the German legislation,

¹ Chaufon, ii., 159. ² *Ib.*, ii., 160. ³ *Ib.*, ii., 160.

and particularly the Austrian legislation.¹ Two cantons, the French one of Geneva and the German one of Zürich, have more complete legislation on insurance than the others. The Geneva legislation, regulating the position of the hypothecary creditor towards his debtor and the insurer in fire insurance, is interesting, and will be referred to more fully later.²

16d. Austria-Hungary.—In the division of Cisleithanien part of the German Code of Commerce was adopted in 1862. In the division of Transleithanien insurance is regulated by the Hungarian Code of Commerce of 1875.³

16e. Russia, Sweden, Norway and Denmark.—In Russia, the insurance legislation is mainly contained in the Code of Commerce of 1857.⁴

In Sweden, the principal insurance legislation is that of 1864. The system of state insurance of real estate is in force there, as in the rest of the Scandinavian peninsula.

In Norway, the principal text on insurance is the Norske Lov of 1867; and in Denmark, Chapter 6 of Book IV. of the Danske Lov of 1683.⁵

¹ Goldschmidt, Handbuch, 221 et seq. ² See index for § Infra.

³ See for these divisions Annuaire de législation étrangère, 1875, 237.

⁴ Chaufton, ii., 255. Anthoine de Saint Joseph, 1-134. J. von Schultz, Riga and Leipzig.

⁵ Pardessus, lois maritimes, iii., ch. 18, 265-308. Chaufton, ii., 253.

CHAPTER II.

THE NATURE OF THE CONTRACT AND THE DIFFERENT KINDS OF INSURANCE.

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ANCE—DEATH WITHIN CERTAIN TIME — NON-FORFEITURE POLICY — INSURANCE AGAINST THE BIRTH OF ISSUE — CONTRACTS OF INSURANCE COMPANIES AND BENEFICIAL SOCIETIES DISTINGUISHED — CONTRACTS OF MUTUAL BENEFIT INSURANCE SOCIETIES—ASSESSMENT INSURANCE — UNDER ASSESSMENT PLAN PREMIUM CANNOT BE FIXED BEFOREHAND.

26. **LICENSES REQUIRED — EXEMPTIONS UNDER SECTION 43 OF INS. ACT OF CANADA — SOCIETIES REGISTERED UNDER SECTION 38 MAY MAKE DEPOSITS.**

27. **ACCIDENT INSURANCE — DEFINITIONS OF ACCIDENT—WHAT THE TERM "ACCIDENT" INCLUDES—EXPOSURE TO DANGER — EMPLOYERS' LIABILITY INSURANCE—ELEVATOR ACCIDENT—CARELESSNESS OF EMPLOYEE — EMPLOYER NOT LIABLE.**

28. **BURGLARY INSURANCE.**

29. **VARIOUS OTHER INSURANCES—DEFINITION OF PLATE-GLASS INSURANCE — NEGLIGENCE IN REPLACING GLASS.**

30. **FIDELITY INSURANCE.**

31. **TITLE INSURANCE UNDER PENNSYLVANIA STATUTE.**

17. Early writers on the contract.—The early writers upon insurance discuss its peculiar nature at length. With them insurance is now *nudum pactum* and now *contractus innominatus*, now a wager and now a stipulation, a security, a sale, a letting to hire, a partnership, a mandate, and the like, and they plunge into

the theory of the Roman law upon the subject of these several pacts.¹

18. Contract unknown to Roman law; its characteristics are special.—As we have seen, however,² the contract of insurance was unknown to the Roman law. While governed in the main by principles of law similar to those which regulate other contracts, it is in some respects a peculiar contract, distinguished by special characteristics, and requiring for its proper elucidation to be interpreted in the light of the circumstances in the midst of which it has grown up, and with a just appreciation of the purposes which it is designed to effect.³

19. A conditional and aleatory contract.—It is a conditional contract, for, as we shall see, when no risk attaches, no premium is to be paid, and if paid, it must, in the absence of fraud, be returned to the assured;⁴ for the existence, either real or imaginary, of a risk is the fundamental condition of an insurance contract, without which it would have no object. The French writers term the contract aleatory, from *alea*, a die or throw of the dice, a word for which our adjectives “gaming” and “hazardous” are not exact equivalents, the word meaning here a speculative contract or contract of chance. They distinguish it from a commutative contract in which the thing given or act done by one party is regarded as the exact equivalent of the money paid or act done by the other.⁵ But Blackstone does not seem to accept this view.⁶ According to Griswold⁷ the insurance contract is said to be an “aleatory” one, since the consideration paid is not the price of the thing which the insurer gives, but of a risk that he agrees to assume.

The word “aleatory” cannot, of course, be taken literally, in its original meaning, as, although in a sense based on the element of chance, modern insurance in nearly all its branches, has developed into a science. Insurers have learned in the course of practical experience, that the law of average governs even those events which at first appeared to be subject to no rule, and

¹ May, 4, § 3. ² *Supra*, § 2.

³ Pothier *Traité des Ass.*, 87; Emerigon, *do.*, c. i., § 2.

⁴ May 5, § 4; Alauzet *des Ass.*, 179; Pothier *des Ass.*, 4; Pardes *sur Drt. Com.*, 506, 3; 2 Marshall, 663, and see index for § *infra*.

⁵ Vide Rogron *Code de Com.*, Ex. Tit., x., *des Ass. Int.* ⁶ Vide *infra*, § 20.

⁷ *Agents Text Book*, 38.

by operating on a large scale, as well as by wise restrictions and adequate rates of premiums, they have succeeded in equalising the effect of any periodical calamity, such as an epidemic or conflagration, and have thus eliminated the disastrous character from the "element of chance," which naturally attaches to the events the consequences of which the contract covers or guards against.

20. Insurance in general is a contract of indemnity—Life assurance is not.—Insurance is a contract whereby one party called the insurer or underwriter, undertakes for a valuable consideration, to indemnify the other, called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event.¹

It is also defined as a contract by which one party undertakes to pay a certain amount of money in the event of certain casualties; that is, one binds himself to pay a certain amount which is fixed, and the other binds himself to pay an amount if such and such an event should happen.²

This definition evidently refers to stock companies only. The best definition of the contract is said to be given by Blackstone: A policy of insurance is a contract between A and B, that upon A paying a premium accepted as equivalent to the risk, B will indemnify against a particular event.³

Griswold's⁴ definition of fire insurance is as follows:—A contract by which, for a consideration, one party agrees to make a payment of money, or its equivalent, to another party, upon the happening of an injury to, or destruction by the peril insured against of something tangible and having a money value, named and located in the policy, which is the evidence of such contract, and in which the second party had an insurable interest at the time of the insurance and at the time of the happening of such injury or loss thereto, if not voided by some breach of condition meanwhile.

Insurance is strictly a personal contract, and not an insurance of the property named, which only forms the subject of the indemnity, and cannot be insured.

¹ C. C. L. C., 2468. Poth. Ass., 2; 1 Bell, Com., n. 534, p. 509; 1 Em. 2; 2 Par. 588; 3 Ib., n. 756; 1 Arn. 1, § 1; 3 Kt., 252; 1 Alau, n. 108; 1 Ph., s. 1, p. 1; Marsh, p. 1.

² Judge Dugas in *Grose v. Wood*, Montreal, June 14th, 1895, confirmed in *Q. B.*, *Würtele, J.*, 30th March, 1896, vide *infra*, § 28.

³ 2 Blackstone's Comm., 458. ⁴ Griswold, 325.

It is the owner of the property who is insured or guaranteed against loss upon such property to the amount named in the policy.

Phillips defines the contract of insurance as one whereby, for a stipulated consideration, one party undertakes to indemnify the other against damage or loss on a certain subject by certain perils.¹ This definition regards the contract as one of indemnity only, and in the United States text writers and judges alike regard all insurance contracts (including life) as contracts of indemnity. In their view, insurance upon a ship or a house at a fixed valuation and at an annual premium until one is lost or the other is burned, is in no way different in principle from the insurance of a life at a fixed valuation and at an annual premium until death. In the one case the insurance is against the loss of capital which produces income; in the other it is against the loss of faculties which produce income.² Fire insurance is protection against loss by fire, and it is based on the productiveness of the property insured, present or prospective, and the possibility of its destruction by fire. Life insurance is protection against financial loss by death, and it is based upon the productiveness of the person insured, present or prospective, and the absolute certainty that he will die.³ Our Canadian courts follow the law of England where life insurance forms a class apart from other insurance contracts.⁴ It would seem, however, that the difference is not in the results, but rather in the view of the principles on which the results are based. Fire, accident and other policies in general insure against the consequences of something which *may* occur. Life policies assure against the consequences of something which is *sure* to occur—the date only being doubtful.

21. Use of terms "assurance" and "insurance."—"Assurance" and "insurance" have long been used as synonymous terms. Recently, however, "assurance" has been used in England in relation to life contingencies, and "insurance" in relation to other contingencies. As said above, contracts of life insurance in England are not contracts of indemnity, they are contracts to pay a specified sum in a certain event.⁵ The leading English case is *Dalby v. The India & London Life Assurance Co.*,⁶ in

¹ 5 Ed., 1. ² i. May, § 7, p. 8.

³ *Commonwealth v. Wetherbee*, 105 Mass., at p. 160.

⁴ See remarks of Burton, J., in very recent case of *Manufac. Life Ins. Co. v. Gordon*, 20 A. R. (Ont.), 309, *infra* §.

⁵ *Smith Merc. Law*, 10 Ed., 304. ⁶ 15 C. B., 365

which the doctrine laid down in *Godsall v. Boldero*,¹ that insurance being a contract of indemnity, the insured could found no claim upon his policy if the debt or other interest in respect of which he made it were satisfied *aliunde*, was overruled, and it was decided that a life policy both in form and effect is an absolute contract to pay a certain sum in the case of death. In 1880 the justices in appeal in England held in the case of *Darrell v. Tibbitts*, that the contract of fire insurance as that of marine insurance is a contract of indemnity, and that the insured could not get paid twice over.²

22. Contract is consensual and bilateral.—The contract is consensual and bilateral. If payment of the premium is admitted in the policy the contract has been said to be unilateral.³ But this is inexact for, though the premium is paid, the assured has obligations which make the contract viewed in its entirety conditional and bilateral. Fire insurance policies in France and other continental countries are generally for a term of years, for annual premiums promised, and with fifteen days of grace to pay each instalment of premium, and all premiums are payable at the office of the company. The policies are bilateral contracts, and in France must be made in duplicate, signed by both parties, at least where premium is not paid in cash.⁴ In Quebec, policies in duplicate are not usual nor required, and the Civil Code⁵ points to signature by the insurer only.

23. Scope of fire insurance.—In Quebec the Civil Code formally enacts, and as a general principle it may be stated, that insurance may be made against all losses by inevitable accident, or irresistible force or by events over which the insured has no control; subject to the general rules relating to illegal and immoral contracts.⁶

23a. Insurance a commercial contract, except mutual insurance.—General remarks on the contract of fire insurance.—Insurances other than marine are not by their nature commercial, but are so when carried on by insurance companies⁷ or

¹ 9 East, 72. ² 5 Q. B. D., 560. ³ Dictionnaire des Ass. Ter., 558.

⁴ Boulay-Paty, dr. mar. and other authorities cited in Sirey & Gilbert, codes annotés, C. N. 1325, 85. ⁵ C. C. L. C. 2569.

⁶ C. C. L. C. 2476; 2 Pardessus, 591; Marshall Prel. disc., 1; Phillips, 157, c. 10; C. 1008; Alauzet Ass., c. 9, pp. 299 et seq.

⁷ C. C. L. C. 2470; 2 Pardessus, n. 588, pp. 443 et seq.; 1 Dalloz Dict. Vo. Ass. Ter., Nos. 19, 20, 22; Smith v. Irvine, 1 B. de L., 47.

other parties as a business. Mutual insurance, however, which is governed by special statutes is not commercial,¹ though a mutual insurance company may make a commercial contract.² It would seem, however, that this distinction is mainly of importance in Quebec, and where the rules of evidence differ in commercial and non-commercial cases. The rule laid down with regard to the commercial character of the different kinds of insurance in the Civil Code of Quebec, is adopted from the Code de Commerce, Art. 633, and the authorities under the French law. The commissioners who drew up the Civil Code of Quebec remark that, while the contract is almost always commercial on the part of the insurer, it depends on circumstances left to the discretion of the courts whether it is so or not on the part of the insured.³ Carrying on the business of ordinary fire insurance is considered trading in the Province of Quebec.⁴

As we have seen, fire insurance is a contract of indemnity intended to protect the insured against the pecuniary loss caused by fire impairing or destroying property specified in the policy. It is not intended to result in a profit to the insured, but merely to reimburse him for actual damage sustained. The premium, in consideration of which the insurance is undertaken, bears a certain proportion to the amount and risk involved. Fire insurance is carried on as a commercial enterprise by joint stock companies; with these the policies are issued at a fixed premium which remains unchanged during the whole term of the contract, or by mutual societies, where the amount of the premium may be increased, and chiefly depends upon the amount disbursed for fire losses. In Canada, policies on mercantile risks are not issued for a period of more than twelve months, while those on dwelling houses and ordinary household furniture are issued for terms up to three years. In France and Germany, policies are issued for one, five, ten years, and even a longer term; the reason for this is, on the part of the companies to secure the risk for a number of years, and on the part of the insured to avoid frequent payment of the fee charged in addition to the premium, by the majority of companies for either new policies or renewals. While

¹ R. S. Q., 5264 et seq., and C. C. L. C., 2470.

² British Empire Mut. Life Ass. Co. & Bergevin, 5 R. J. Q., Q. B., 55.

³ Report of Comms., vol. iii., p. 242.

⁴ Mackay's Treatise on Fire Ins., 13 L. N., 140.

the premiums for three years' policies in Canada are paid in advance, only two years being charged, and a saving of one annual premium to the insured thus effected, the long term policies on the continent of Europe are paid annually or, if paid in advance, at a considerable corresponding reduction.

There are a great variety of mutual fire insurance associations, some of them doing business in the same manner as joint stock companies throughout the country, and taking all classes of risks, while others confine themselves to their own province or even a smaller district, or insure only a certain trade, in which case, however, their existence is rarely of long duration, their operations being on too limited a scale to allow the law of average to take effect.

23b. Chomage and rent insurance.—Although fire insurance originally was, and in most cases still is applied to movable or immovable property only, the idea of protection against loss through fire has been extended in some countries to cover pecuniary loss sustained, for instance, from an enforced idleness of a factory in consequence of a fire, or loss of rent derived from a building destroyed by fire, or, especially in France, any liability accruing to a tenant towards his landlord or to neighbours as a consequence of fire. The former kind of insurance is known as "chomage" insurance, from the French word "chômage," "resting from work" and was first introduced in France and applied to the insurance of workmen's wages during the time needed for repairs in the event of compulsory stoppage of work by the occurrence of fire. It was subsequently extended to merchants, manufacturers and others to cover consequential damages arising from the occurrence of fire not covered by the ordinary fire insurance, such as loss of revenue from capital, plant or machinery, etc., caused by destruction of the property of the insured. The latter may thus hold simultaneously a regular fire policy upon building or contents, and another entirely distinct upon the same property, but based upon the productive value of such property and the average yearly income derived therefrom, upon which interest at a certain rate per cent (usually six to ten) is guaranteed by the policy from and after the fire, and during such time as from the circumstances attending the loss, the capital invested may remain totally or partially yet compulsorily unavailable to the insured. The cases of rent or lease policies represent the principle exactly. There can be no chomage insurance without a

corresponding fire insurance upon the property, and the amount of chomage insurance is always limited to the existing amount of the fire insurance. This principle is the foundation of mortgagee, rent and lease policies, policies on profits, on income or commissions unearned, and insurance upon production at mills under contracts against failure to fill such contracts, when such failure is caused by fire.¹

Griswold says the plan does not seem to have met with much favor outside of France.

23c. Recent American decision on insurance of rent—Value of American holdings as applied to Canadian cases.—American decisions, though not authorities in any way binding on Canadian courts, are well worthy of consideration by them.² One of the most recent of these on the question of rent insurance is the following:—The insurer had by the policy agreed to indemnify the insured, a tenant of a building under lease, for “any loss accruing to her by reason of having to pay rent for the (therein) described building such time or times as the building may be untenable by reason of fire, or fires, occurring during the continuance of this policy.” A fire occurred and up to a certain date, when rebuilding was commenced by the landlord, the company acknowledged its liability and paid the rent for which the insured or lessee was bound. The legal effect of commencing to rebuild was to release the tenant or lessee from liability for rent. The landlord had also an insurance with another company against losses of rent by such happenings, and the tenant, landlord, and the insurer of the latter had an understanding between them, and an agreement was entered into by which it was attempted to avoid a termination of the tenant’s policy. The tenant, in consideration of an agreement for an extended lease of the buildings when rebuilt in an improved manner, agreed that the re-entry of the landlord for the purpose of rebuilding should not release her from liability for her rent under the original lease, as would be the effect at law, and in an article of the agreement appended, it was stated that “the respective parties reserve their rights against the respective insurance companies under the policy of insurance which each holds for rent, and nothing herein contained shall be construed as affecting

¹ Griswold, *Fire Underwriters Text Book*, 2 Ed., 9.

² Strong, C.J., in *Niagara Dist. Fruit Growers' Stock Co. v. Walker*, 26 S. C. R., 639.

the right of either party to recover for his or her policy of insurance against each of said companies." This action was to recover the rent paid by the tenant for the rest of the term of insurance under the agreement above stated. The insurer defended on the ground that the landlord being fully insured against loss of his rents by fire in another company, under a policy which contained an agreement that the assured would rebuild or repair the premises in as short a time as possible after the occurrence of a fire, but in case he should elect not to do so, the loss of rent should be determined by the payment of rent under it by the insured during the time which would have been required for such purpose, and with a view to be subrogated to the right of the landlord's claim for rent against the tenant, and thereby reimbursing itself, through the tenant's policy issued by this insurer, that company induced this whole arrangement with a view to reduction of the amount of its liability. The court said ; "The payment of rent under the subsequent agreement by the insured was a voluntary undertaking, and not a legal obligation under the first lease, against which alone the policy undertook to indemnify her." Further they said : "If (the facts stated in the pleadings) were true, they showed a fraudulent attempt on part of the plaintiff, the landlord, and (the other insurance company) to shift a burden which belonged on them to the defendant. But even if there was no such fraudulent purpose, the effect of the agreement was to continue upon the defendant an obligation from which the law relieved it, and no stipulation between the other parties without its consent could accomplish such a result." The Supreme Court of Pennsylvania therefore held that the agreement entered into between the tenant and her landlord for the re-entry and rebuilding discharged the insurer from all liability.¹

23d. Leasehold policies.—A leasehold policy secures to the lessee of certain specified property any difference in value between the sum he may pay as rent for the leased premises and the value of the property to him, for occupancy, either for his own purposes or in the increased amounts he may receive for rents from his tenants. The longer the term the more valuable the lease ; and as it may be determined at any moment by burning, the amount covered should be the value of the lease.

¹ *Heller v. Royal Ins. Co.*, 1890, 133 Pa. St., 152.

Neither rent nor lease policies have any connection with the value of the buildings as such.¹

24. Reinstatement and abandonment.—It might seem to flow from the contract of insurance being a contract of indemnity, that reinstatement or the restoring of the destroyed property, is a fulfilment of the contract. But the right to reinstate does not exist at common law, it must rest on statute² or on stipulation. In Quebec, in the absence of a stipulation in the contract, the statute law being silent, no right of reinstatement exists. In Ontario, until 50 Vic., c. 26, s. 154, 14 Geo. III, c. 78, s. 83, continued in force, though it was inconsistent with statutory condition 18.³ Since this act, 50 Vic., c. 26, the right to reinstate is defined by the Ontario statutory condition 18, which provides that in case of loss or damage to property, included in a policy of fire insurance, the company instead of making payment may repair, rebuild or replace within a reasonable time the property damaged or lost, giving notice of their intention within fifteen days after receipt of the proofs of loss required by the statutory conditions.⁴

Griswold⁵ defines abandonment as an act at the option of the insured, whereby, in the event of loss, he relinquishes and transfers any salvage or remnants of the property at risk, or the proceeds thereof, to the underwriters and claims of them as for a total loss. As a custom or usage, abandonment of damaged property is not recognized under the fire insurance policy, for there can be no compulsory abandonment of salvage where the right of reinstatement exists, as under the provisions of the fire insurance contract; so that any salvage remains the property of the insured, the underwriter getting credit therefor in the adjustment of the loss claim to the amount of its appraised value. As to reinstatement, the terms of all fire policies provide for the rebuilding or reinstatement of burned property in lieu of payment in cash, at the option of the company. This option relieves the fire insurance company from the necessity of accepting an abandonment of the property, as in marine insurance, for, as said above, there can be no abandonment where the company has the option of reinstatement. In reinstating personal property the substituted articles must be of equal quality and value as those burned, and in rebuilding the new

¹ Griswold, 519.

² Porter on Ins., 253. ³ Carr v. The Fire Assurance Ass., 14 O. R., 487.

⁴ Ont. Ins. Act, 1897, 60 Vic., c. 36, sec. 163, ss. 18. ⁵ Griswold, 1, 513.

edifice must be equal in all particulars to the old. The determination of the underwriter to rebuild at once changes the insurance policy into a building contract at the expense of the company.

24a. Insured entitled to an expertise.—Where the plaintiff's house had been destroyed by fire, and the insurance company availed themselves of a clause in the policy by which they had the option to rebuild, but afterwards refused to redeliver in the condition in which the insured claimed it should be, it was held, on action brought, that the plaintiff was entitled to an expertise, and so long as the company had not complied with that condition, he was not bound to receive the house, and the circumstance of his having, during construction, made suggestions to the builder, could not be held to deprive him of his right to an expertise.¹

25. Scope of life assurance.—Life assurance has developed from its original simple form into a great variety of methods and systems in most of which the idea of insurance in case of death predominates, while in others it is combined with a provision for old age or an investment to be realized at the expiration of a term of years.

The business of life assurance is carried on either by joint stock companies as a commercial enterprise or by mutual societies for the benefit of members only and without the purpose of making a profit in the commercial sense of the word.

The different plans of insuring life are too numerous to be described at length in this work ; they are, moreover, constantly being changed and added to, owing to the keen competition of the many institutions in this branch of insurance. It must therefore suffice to give a short sketch of the plans most generally in use at present.

A straight life policy is one for which a premium is paid every year during the entire lifetime of the assured, with or without participating in the profit made by the company ; the policy maturing upon his death. As a rule the premiums are calculated to be paid up to a certain age only or for a certain number of years and may even be paid in a single amount. The sum assured is either payable at death or at a certain age.

The choice of the plan of assurance depends entirely upon the

¹ *Alleyn v. The Quebec Assurance Company*, 11 L. C. R., 394, S. C., 1861.

kind of provision the applicant may desire to make and upon the sum he is able to disburse annually for such a purpose. If his means are limited, he will take the simplest and cheapest form, that is a "life" policy for which he has to pay every year until death intervenes; but if he can afford to pay a somewhat increased premium, he has a greater choice and will perhaps take a "limited payment life" policy, which means that the paying of a premium on his part ceases after 10, 15 or 20 years, or more, and that the accumulation of profits, if his policy entitles him to share in them, will be considerably increased, besides other advantages as to surrender value, etc.

If the assured is entitled to a share of the profits, the latter are often applied to a reduction of future premiums.

This plan of life assurance has been resorted to in order to relieve the assured of the payment of premium when, later on in life, he may, perhaps, be less able to bear the burden of such payment; it was thus a step in a forward direction, contemplating as it did the future of the person assured himself, and it prepared the way for the introduction of another very important kind of life assurance which has met with general favor, as it not only provides for the family of the assured, in case he should prematurely die, but also secures for himself a certain amount of money upon his reaching the age stipulated in the policy. This plan is called "endowment insurance." It is adopted by those who are willing and in a position to lay aside for a number of years in the shape of premiums a larger amount than is required for other forms of life assurance, thus procuring a safe investment returnable at the expiration of the term of years stated in the policy, should the assured be then alive, in addition to providing for the beneficiary through the payment of the sum for which the policy was issued, if death should occur before the policy matures. Such policies are issued for terms of 10, 15, 20 or more years. At the maturity of an endowment policy several options are offered; the assured may either surrender his policy in return for the reserve and surplus accumulated thereon, or he may receive the surplus in cash and allow the policy to remain in force with the original amount to be paid upon his death, or he may take out a fully paid-up policy for a considerably larger amount than the original sum contracted for.

It is also sometimes, as a more recent innovation, provided that the amount of the policy shall not be payable immediately

upon assured's death, but at a later date stated in the contract, or in certain annual instalments, in which case the company allows interest at a fixed rate, thus providing for the beneficiary a profitable investment, and relieving him of the trouble of making such an investment when, perhaps, he might be able to do so at a less favorable rate of interest only.

An essential part of the endowment plan being in the nature of an investment for contingencies expected to take place in a future comparatively remote, it is specially adapted to a provision parents may make for their children. An endowment policy taken out on the lives of young children may be considered a suitable way to provide at the proper time the capital necessary to pay for the higher education of a son, to enable him to start in business for himself, or to give a dowry to a daughter.

This particular form of endowment insurance has developed in England and has also been introduced in Canada. The premium in some cases is arranged to be returned, if the child should die before the policy matures.

Any insurance effected on the lives of minor children in Ontario must conform to the requirements of section 150, ss. 1-5, of the Ontario Insurance Act, 1897.¹

25a. Tontine and semi-tontine.—Tontine policies are issued in any usual form such as ordinary life, limited payment life or endowment policies. They are issued at the usual rates of premiums, and the difference between such policies and ordinary policies lies in certain peculiar stipulations. The first stipulation is as follows: "No dividend shall be allowed or paid upon this policy until the person whose life is insured thereby shall survive the completion of its tontine dividend period, and unless this policy shall then be in force." The period referred to is either ten, fifteen or twenty years, according to the choice made by the policy holder in his original application. The effect of this stipulation is that each premium must be paid in full in cash during the tontine period without being reduced by dividends. The second stipulation is: "Previous to the completion of its tontine dividend period, this policy shall have no surrender value in a paid up policy or otherwise." The effect of the stipulations above quoted is to produce savings to the company, first in not paying out dividends,

¹ See Hunter's, Ont. Ins. Corpor. Act, 1892, p. 42, and 60 Vic., c. 36 (O.)

and secondly in not issuing paid up policies in case of lapse. The value of such savings with their accumulations is credited to the tontine policies which complete their respective periods. Semi-tontine policies form a separate variety being like tontine policies as regards dividends, but enjoying the same privileges as ordinary policies in case of lapse as regards paid up insurance. An account is kept by the company from year to year of the special savings derived from tontine policies, and a separate account is kept for semi-tontine policies. To keep in view the equitable rights of each tontine and semi-tontine policy, a provisional account or memorandum of its contributions to the undivided surplus is kept, including its share of special tontine profits, adding interest from year to year at the current rate used in the ordinary dividend calculations. The sum of all these memorandum accounts shows the total tontine surplus of the company. The memorandum thus kept of each policy is subject to future rectification, and is not in the nature of a deposit account nor does it create any liability different from the duty of every company to distribute in due time its undivided surplus on equitable principles.¹

The invention of the tontine plan is ascribed to Lorenzo Tonti, an Italian, by whom it was propounded about the middle of the seventeenth century, as a mode by which the governments of the day might obtain loans. There seem to be several forms in which from time to time tontines have been arranged, but the general idea (as we have seen as applied to life assurance) is that property is loaned or owned or invested for the benefit of a number of persons, who at first receive its income divided among all; when one dies, however, his share goes, not to his heirs or representatives, but to increase the sum divisible among the surviving members. As the number of members diminishes by successive deaths (no new members are created) the annuity of each is increased until at length the last survivor takes the whole income, or it may be the whole principal, if such were the terms of the foundation.”² The Supreme Court of Massachusetts, Devins, J., have well described the nature of the contract in such insurance as follows:—The principal characteristics of the policy in this case are these: It was for the sum of \$10,000 payable on the decease of the insured to him, his executors, administrators or assigns, and was for the term of

¹ Hunters, Ont. Ins. Corpor. Act, 1892, p. 48. ² 2 Abb. L. Dict., 572.

his life. It was known as a tontine policy on the savings insurance plan and was to continue as such for the term of ten years, if the insured should live so long. If the holder of the policy died during the tontine, which expired on a date named, his estate would not receive any benefit from the dividends which ordinarily are made on life assurance policies annually or at stated periods, which dividends consist of the surplus of premiums after deducting the cost of insurance and the computed reserve, these being then held by the company for the benefit of the other policy holders and forfeited by him. His estate would receive only the amount of his policy. If the holder of a policy should also fail during the tontine time to keep up his policy by payment of the premium, it would be forfeited. Policies of this character are kept in classes of ten, fifteen or twenty years, according to their tontined periods, and, while the funds of each class are not kept separate, distinct accounts are kept with each class so as to show the amount to which it is entitled, and by this means the amount due upon each policy at the expiration of its tontine term. At the expiration of ten years, if such be the term, or at the completion of the tontine dividend period, it is provided that all surplus or profits derived from such policies on the tontine savings fund assurance plan, as shall cease to be in force before the completion of their respective tontine dividend periods, shall be apportioned equitably among such policies as shall complete their tontine dividend periods. To this is added an agreement giving an option to the policy holder as to what he will have done with his share of such profits, stating different uses to which he may have it applied, if not withdrawn in cash.”¹

25b. Joint Lives — Annuities — Annuity apportionment.—Policies are also issued on the joint lives of two persons, say husband and wife, or two partners in business, the amount assured to be payable at the death of one of the parties. Life insurance companies also grant annuities payable annually, semi-annually or quarterly during the life of the assured. This kind of contract is the reverse of life assurance proper, as the company is the party that receives the capital and pays it back in instalments until the death of the assured terminates the contract.

The following is a recent Ontario decision: In consideration of \$12,000 paid by plaintiff's testator to the defendants, they, by

¹ *Pierce v. Equitable Life Assur. Soc.*, 1887, 145 Mass., 56-58.

an instrument in writing, agreed to pay him \$1,800 every year during his natural life, in equal quarterly payments of \$450 each. The terms "policy" and "annuity bond" were both used in the document itself as descriptive of its nature. The consideration was stated to be not only the \$12,000 but "the application for this policy and the statements and agreements therein contained, hereby made a part of this contract;" and it was provided that upon certain conditions "this policy shall be void."

Held, in an action by his executors, that the instrument was not a policy of assurance within the exception in Revised Statutes of Ontario, ch. 143, s. 5, but an annuity bond; and that the money payable by the defendants under it was apportionable within section 2, and therefore the plaintiffs were entitled to recover a part of a quarterly instalment in proportion to the period between the last quarter day and the death of the testator.¹

The sections of chapter 143 of the Revised Statutes of Ontario referred to in the above case are as follows:

"2. All rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

"5. Nothing in the preceding provisions of this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description."

25c. Annuity fund for widows, etc., of government employees, authorised by government—Rights of subscribers.—The Customs Annuity and Benevolent Fund was established by Act of Parliament in England for the benefit and relief of the widows and children or other relatives of the established officers, clerks, or other persons employed in the department of customs. The act authorized a "Contribution of Poundage" to be levied on and deducted from the salaries of the officers, etc., who did not decline to make such contribution (although they did not become subscribers) which formed the nucleus of the fund. Rules were to be made with the same force as though enacted. The directors were to have the full, entire and exclusive control and management of the fund, subject to the rules, and might from time to time alter

¹ Cuthbert vs. North American Life Assurance Co., 24 Ont. Reports, p. 511, 1894.

any of the rules and substitute others, with the approval of the persons becoming insurers, who were called "subscribers." The subscriptions were upon the principle of life insurance. One of the rules provided that "the capital money forthcoming at a subscriber's death, by virtue of his insurance, shall, subject to the following regulations, be appropriated according to the directions contained in his will or codicil, or in any instrument of writing signed by him in the presence of an attesting witness, and deposited with the directors during his lifetime, or within three calendar months after his death and which instrument may, at the option of such subscribers, be made absolutely irrevocable, or, in default of any such direction in manner hereinafter described." There was subsequent legislation by parliament; the authority to levy poundage was taken away and new rules were made, by which the fund was to continue to be raised by subscription on the principle of life insurance for the benefit of the widows, children, relatives and nominees of officers, and the admission by the directors of nominees of subscribers should take place during the subscriber's lifetime. Under the rules the widow's share should be one-third, if appropriated in creation of an annuity, or two-thirds, if set apart for investment, and in either case the remainder of the capital money should be "subject to the direction of the subscriber, and applied or paid in any manner or proportion he may think fit, for the benefit of his widow, children, blood relations, or any of them, or his nominee or his nominees who shall have been duly admitted by the directors." If the widow was "provided for in the manner aforesaid," or if there was no widow, "then the whole capital money shall be subject to the direction of the subscriber as aforesaid." If a subscriber died, leaving issue "without having, by will or such other instrument as aforesaid, directed the application of the capital money herein placed at his disposal," the same became the property of the children equally. If there was no widow, child, or issue, the whole capital money went to the subscriber's next-of-kin.

Where a subscriber died a widower leaving three children, by his will he bequeathed his insurance to a third party who was not a relative of his, and who was never admitted as a nominee by the directors of the fund. In this way arose the question of who was entitled to this capital fund under the statute and rules under which it was accumulated and administered, and what rights as to this fund the subscriber had under the statute and rules.

The Court of Appeal held, that the children were entitled to this fund. As to the rights of the subscriber, Jessel, M.R., said : "Originally the subscriber could not help paying, because it was deducted from his salary ; but it is really nothing but a power of appointment. The wording of the second set of rules is a little embarrassing, because we find the use of the word "aforesaid" twice over, which may refer to different things ; but it is obvious to my mind, when you look at the alternative, that the rule is intended to remain as it was at first. But, if that is so, there are two decisions on the first set of rules, and they both go in the same direction. There is a mere power of appointment, and in default it goes to the persons named. If there is no widow and no person named, it goes to the children. Is there any exercise of the power of appointment ? I think there is not. It is not quite as put by counsel, that the insurance is the subscriber's own property. The Act of Parliament takes away a certain sum out of his salary, and when it is taken away it ceases to be his. It gives him instead these rights, but these rights have really no reference directly to the person paying. That being so, is there anything really inconsistent in leaving the directors to say whether or not the nominee should be accepted ? It is quite possible, and I think it was intended by the original Act, that the directors should have a discretion and be able to say, if a man has a wife and a dozen children, that he should not exclude them, or that he should not compel the directors to accept the nominees at all. It is quite consistent with the object of the Act. No doubt the object of the original Act was to protect the treasury from the claims of the widows and children of these officers, by compelling the officers to provide in their lifetime by compulsory savings—for that is what it comes to—for their widows and children. That is the primary object of these provisions. If that is so, that is quite consistent with the theory of mere appointment, which is the basis of the Act. I think that is the true view of the rules, and consequently in this case the nomination not having been registered in the lifetime of the officer, there is no nominee who can take under the rules, and, therefore, that the children are entitled to what they are asking for."¹

25d. Industrial insurance.—A plan adopted by some companies is known as industrial insurance ; it has developed to a

¹ *Re Phillips Ins.*, 1883, 23 Ch. D. 235.

surprisingly large extent, and is chiefly favored by the working classes and people of limited means, as the premiums are collected weekly and are therefore more easily payable, the amount assured as a rule being much smaller than in other life assurance policies, and often only just sufficient to pay funeral expenses and assist those who were dependent upon the person assured for a short time after his death.

25e. Death within certain time.—There are also life policies issued, although they are not very frequent, containing something of a speculative character, and which provide for the payment of the sum assured only if death takes place within the time stipulated in the policy.

24f. Non-forfeiture policy.—Life insurance companies issue policies which entitle the holders, after the payment of premiums for a number of years, upon a surrender of the original policy to have a new policy issued for such a proportion of the original amount of indemnity, as the number of years bears to the whole number of years for which the policy was originally issued.

Upon one of these policies the words "Non-forfeiture policy" were conspicuously printed. In a case before the New York Court of Appeals, *Andrews, J.*, as to the rights of the holders of such a policy, has said: "A reference to the body of the policy shows that it was not intended to make the policy non-forfeitable except in a limited sense. The assured was not relieved from the obligation to pay the premium annually on the day specified. By the express terms of the contract, an omission to pay the premium on the day it became due avoided the policy. But, if at the time of such omission he had paid two or more premiums, the company bound itself to issue a new policy for as many tenths of the original insurance as there had been premiums paid. This was the only sense in which the original policy was non-forfeitable. The assured would not lose all benefit from premiums paid, if the policy should become void by an omission to pay subsequent premiums. An omission to pay the premiums, when due, terminated the original contract, but the assured, if he had paid two or more premiums, would, on a surrender of the policy, be entitled to the substituted contract as provided. In case of a breach of any of the conditions of the policy, other than the omission to pay the premiums when due, the assured was in no way protected against an absolute forfeiture of the policy."

In this case, one who held a policy given upon the surrender of the original policy, for its proper number of tenths of the whole amount of the original policy, presented it as a claim against the receiver of the company, which was being wound up in insolvency, and the claim was dismissed on the ground that, by its terms, it had been forfeited. It was insisted, that the insertion in the new policy of the clause of forfeiture for non-payment of interest annually on the outstanding premium notes given for premiums on the old policy was unauthorized by the terms of the original policy. The Court of Appeals held, that conceding the claimant, after having accepted and retained the new policy for so long a time, could now insist that the forfeiture clause was inserted without authority (as to which *quare*) the new policy conformed to the agreement in the original policy, which clearly showed the intention, in case a new policy was issued, to impose upon the assured an obligation to pay interest annually on premium notes outstanding, and the right of the company to insert the usual provision of forfeiture as a means of enforcing this obligation was implied.¹

25g. Insurance against the birth of issue.—This is a class of insurance which does not appear to have been resorted to in Canada or in the United States. No cases bearing upon this subject seem to be reported. Speaking of it in England, however, Bunyon² says, that the insurance of a sum of money upon the contingency of the birth of lawful issue of specified persons is of more rare occurrence, but of importance from the magnitude of the sums which are generally involved in it. Until of late years it was a contract rarely entered into, but appears now very generally adopted by insurance offices. This risk may be either coupled or not with some contingency dependent upon the duration of human life, such as the attainment of a particular age by the issue. The more common case is that in which a tenant for life under a settlement is entitled to the reversion in fee simple subject to an estate tail in his own issue (if any) by the particular marriage, and is desirous of mortgaging the estate without burdening his life interest with the premiums of insurance on his own life. In such a case, after the lapse of a considerable number of years since the

¹ *People v. Knickerbocker Life Ins. Co.* (1886), 103 N. Y., 480.

² *Bunyon*, 104, 105.

marriage, without the birth of a child, the probability of issue is very small, and seems a fair subject of insurance. The principle element for consideration is evidently the age and state of health of the wife, and the risk depends so much upon the circumstances of the particular case, that no general law can be said to prevail by which it may be estimated. The author cites some cases, giving ages of women at which it was presumed by the courts they had been past child-bearing. When the contingency insured against is not only the birth of children by a particular marriage, but includes children by any future marriage of a man whose wife, to whom he has been married for some years without the birth of a child, is still living, the risk appears to depend to a large extent upon the life of the wife.¹

25h. Contracts of insurance companies and beneficial societies distinguished.—Insurance companies generally are not founded on a philanthropic, benevolent, or charitable principle. They are purely business adventures in which, for a stipulated consideration or premium, they engage to make up, wholly or in part, or in a certain agreed amount, any specific loss which the insured or beneficiary may sustain; and the contract may apply to loss of or injury to property, to personal injury, personal or employer's liability, or to loss of life. To grant indemnity or security against loss, for a consideration, is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance.

A benevolent association, however, has a different object in view. The underlying purpose of the organization is not to indemnify or secure against loss, but to accumulate a fund from the contributions of its members 'for beneficial or protective purposes,' to be used in the members own relief in sickness, injury or death. The benefits are secured by contract, and for that reason, to a limited extent, they are assimilated to the proceeds of insurance; but they are rather of a philanthropic or mutually benevolent character; their beneficial features may be of a restricted character; the motives of the members may be selfish in part, but the principle on which they rest is founded on the considerations mentioned. These societies have no capital stock. They yield no profit, and their contracts, although intended to be beneficial and protective, altogether exclude the idea of insurance, or of indemnity, or of security against loss.²

¹ See index for § *infra*.

² See *Commonwealth v. Equitable Ben. Ass.* (1890), 137 Pa., St. 412.

25i. Contracts of mutual benefit insurance societies.—Mr. Hunter points out that, whatever may be the motive underlying the great scheme of life insurance, it is certain that, in its practical application, it is and must be founded upon contract. Its benevolence must flow not from mere good will, but from legal obligation. Its gifts must not depend upon the continuance of the charitable impulse of those who shall pay, but upon mutual promises. Although the object of the insurer in making the contract and the object of the organization with which he contracts are benevolent and not speculative, they have no bearing upon the nature and effect of the business conducted and the contract made. Nor will the character of the contract be changed by the fact that the organization issuing designates itself as a benevolent or charitable society instead of an insurance company. The name of the society will not necessarily fix or establish its real character.

If the prevalent purpose and nature of an association, of whatever name, be that of insurance, its legal character will not be changed by the benevolent or charitable results to its beneficiaries.

A society which by contract agrees to pay the beneficiary of a deceased member a sum of money is a mutual insurance company whatever may be the terms of payment of the consideration by the member or the mode of payment of the sum to be paid in the event of his death.¹

Benevolent associations, benefit societies, fraternal orders, religious and other associations upon a co-operative or assessment plan are governed first by the regulations provided in the statutes, and then by the constitution, laws and rules of the societies, so far as the statutes allow and authorize. Their powers are shown by the rulings of the courts, where their power to do certain acts has been questioned. Where an association, although styled a benevolent mutual association has the essential elements of a life insurance company, it comes within the provisions of the statute regulating life insurance companies.²

25j. Assessment insurance.—In assessment insurance either one or other or both of the following elements are present : (1) The premium consists of sums uncertain or variable in time, number or

¹ Niblack on Mutual Benefit Societies, p. 193 and cases there cited ; see also Hunter's Ont. Ins. Corpor. Act, 1892, p. 37, and see citations, showing what is a mutual company in British Em. Mut. Life Ass. Co. & Bergevin, 5 R.J.Q., Q.B., 55, referred to supra, § 23a. ² Beach, § 128.

amount. This is the case with corporations authorised to transact assessment insurance under section 39 of the Insurance Act of Canada.¹ (2) The benefit of insurance moneys payable by the corporations under the contract² is made dependent upon the collection of sums levied upon persons holding similar contracts, or upon members of the contracting corporation. This includes the definition of assessment life insurance companies, in the Insurance Act of Canada, as a company carrying on business of life insurance by promising to pay, on the death of a member of such company, a sum of money solely from the proceeds of assessment or dues collected, or to be collected, from the members thereof for that purpose.

While in one sense companies transacting business on the premium note plan are transacting assessment insurance, inasmuch as the notes are assessed for the losses and expenses of the company, yet there is a clear distinction between mutual (including fire mutual) companies and companies undertaking contracts within the definition of assessment insurance and between mutual companies and friendly societies. And this distinction, it is proper to observe, although in the United States mutual insurance is sometimes used as synonymous with assessment insurance. In fire mutuals the premium of the assured is the premium note, or his undertaking to pay assessments thereon, in the event of loss, while the insurance is on foot or during the currency of the premium note. The assured is liable to the full extent of the face of the note; he may not withdraw.³

25k. Under assessment plan premium cannot be fixed beforehand.—Under the contracts of companies insuring on the assessment plan, the whole amount that the assured may have to pay, if he desires to continue the insurance, cannot be fixed beforehand; but the premiums consist of sums variable in time, number or amount, and the liability of the assured, apart from special agreement, is within the control of the assured. He, however, may decline or neglect to pay further assessments, and so the policy may lapse. The liability of a member of a friendly society under his contract, at any date, is limited expressly to the assessment of which, at that date, notice has actually been given by the society.

¹ Hunter's Ont. Ins. Corpor. Act, sec. 6. ² *Ib.*, sec. 2, ss. 10.

³ Ont. Ins. Act, 1897, 60 Vic., c. 36, sec. 130, 131; and see Hunter, p. 60.

By tendering payment of such assessments and giving notice of withdrawal, he becomes released from all further liability under his contract.¹

Again, the amount payable under the contract of the mutual company is not in any way dependent upon the amount realized by the assessment. If the company cannot pay its losses in full, it is insolvent; the license of the company to transact business becomes void, and the company goes into liquidation.²

Assessment life insurance companies, under section 36 of the Insurance Act of Canada, may transact the business of life insurance by promising to pay, on the death of a member, a sum of money solely from the proceeds of assessments or dues collected from the members for that purpose. If the assessments do not realize the maximum named in the certificate, the claim of the holder abates.³ Similarly, the companies authorised, under section 39 of the same Act, to transact life insurance on the assessment plan, do not contract to pay a sum certain, but are permitted to carry on business so long as the company continues to pay its losses in Canada to the full limit named in its certificates.⁴

Certain domestic and foreign corporations are empowered, under the Insurance Act of Canada, to transact the business of life insurance on the assessment plan.⁵

The words "assessment system" must be printed in large type at the head of every policy and every application, and also in every circular and advertisement issued or used in Canada in connection with the business of such a company.⁶

26. Licenses required.—By the Ontario Insurance Act it is declared unlawful for companies other than those licensed by the Provincial Treasurer or by the Dominion of Canada, and benevolent, provident, industrial or co-operative societies not requiring a license before the passing of the said Act, to undertake contracts of insurance.⁷

Similarly, by the Insurance Act of Canada, no unlicensed company or person may transact the business of insurance. From

¹ Ont. Ins. Act, 1897, 60 Vic., c. 36, sec. 164.

² R. S. O., 1887, c. 167, s. 46. ³ R. S. C., c. 124, ss. 36, 37, 38.

⁴ R. S. C., c. 124, s. 39, ss. 2, and see Hunter's Ont. Ins. Corpor. Act, 1892, p. 61.

⁵ R. S. C., 124, s. 38, 39, and Ont. Ins. Act, 1897, 60 Vic., c. 36, s. 59, ss. 2.

⁶ R. S. C., c. 124, s. 41, and see sec. 42 (for penalty); Ont. Ins. Act, 1897, 60 Vic., c. 36, s. 85, ss. 4.

⁷ Ont. Ins. Act, 1897, 60 Vic., c. 36, s. 30, 53, 85; and see R. S. M., 1891, c. 24; N.B., 55 Vic., c. 4 and 5; P.E.I., 1894, c. 3; B.C., 1893, c. 12.

this enactment are likewise excepted certain societies or associations.¹

Unauthorised insurance is illegal, and penalties are imposed thereon. The enactment of a penalty avoids the contract, the making of which is visited with a penalty.² If, however, an illegal insurance be effected, the parties being in *pari delicto*, the assured cannot recover in the event of loss, nor can he recover the premiums paid.³

The exception contained in R. S. C., 124, s. 43, does not extend to the transaction of insurance other than life insurance by fraternal or benevolent societies.

Thus, in a case under the Insurance Act of Canada, a conviction was had on an information "that one C. S. unlawfully did carry on the business of insurance other than life, fire and inland marine insurance, that is to say, the business of accident insurance, on behalf of the International Fraternal Alliance, an insurance company within the meaning of section 2, chapter 124 of the Revised Statutes of Canada, without permission obtained from the Minister of Finance and Receiver-General of the Dominion of Canada, and without the license required by law in that behalf, and contrary to the Insurance Act, Revised Statutes of Canada." It was held, on a motion for order *nisi* to quash the conviction, that the scheme of the association was not one of "insurance of the lives of the members exclusively," but was a scheme of accident insurance. Also, that the membership fee and receipt therefor, which was agreed to be accepted at any time as payment *pro tanto* for joining fees to be paid to secure benefits, was a premium within section 49 of the Insurance Act of Canada.⁴

26a. Exemptions under section 43 Ins. Act of Canada.—Section 43 has been similarly interpreted by the Dominion Department of Insurance, on the occasion of various associations claiming the exemption therein contained. The kind of business undertaken, as well as the constitution of the association itself, determines whether a particular association has the benefit of the exemption. Thus, for example, where the purposes of the corporation included temporary aid and assistance to Oddfellows holding

¹ R. S. C., ch. 124, ss. 4, 43. ² Smith on Contracts, 253.

³ Perry v. Newcastle Dist. Mut. Fire Ins. Co., 8 U. C. R., 363; Alkins v. Jupe, L. R., 2 C. P. D., 375; Andree v. Fletcher. 3 T. R., 266; Cope v. Rowlands, 2 M. & W., 149. ⁴ Regina v. Stapleton, H. C. J., C. P. Div., Feb. 9, 1892.

certificates of membership in the association, in case of temporary or permanent disability resulting from accident, the association was held to be an accident association, and on that ground not within the exemption. In order to claim the benefit of section 43 of the Insurance Act of Canada, the association must be engaged in the business of life insurance only, and not in the business of accident and life or marine and life insurance.¹

The constitution of an association comes into question when it is asked : Is this an association for the purpose of life insurance formed in connection with "a society or organization for fraternal, benevolent, industrial or religious purposes, and exclusively from its members," and which "insures the lives of such members exclusively?" For an association is not within section 43, if it is incorporated without reference to, or without the authority of, or without connection with, the association among whose members it expects to do business.²

So far, therefore, as the Insurance Act of Canada is concerned, the several associations above named, and all others of a like character, cannot legally transact insurance in Canada without first complying in all respects with the provisions of the Insurance Act and procuring the necessary license or certificate of registration thereunder.

But any of the above associations, if in other respects within the provisions of the Ontario Insurance Act, 1897, may obtain registry as a friendly society.³

Under section 37 of the Insurance Act of Canada, Canadian assessment life companies may, at the discretion of the Minister, on report of the Superintendent, approved by the Treasury Board, be exempted from the operation of certain sections of the Insurance Act of Canada. Among the provisions from which such companies may be exempted are those of sections 4 *et seq.*, relating to licenses and deposits to be made before the issue of license.

¹ See Report of Superintendent of Insurance, 1890, p. 35, *re* The Oddfellows' Fraternal Accident Association; *re* Preferred Masonic Mutual Accident Association of America.

² See the definition of "branch" in Ontario Ins. Act, 1897, sec. 2, ss. 15; and see Report Superintendent of Insurance, 1890, on The Oddfellows' Fraternal Accident Association; North Western Masonic Aid Association; Preferred Masonic Mutual Accident Association of America; United States Masonic Benevolent Association of Council Bluffs, Iowa. See also *State v. Citizens' Benefit Association*, 6 Mo. App. 163.

³ Hunter's Ont. Ins. Corpor. Act, 1892, s. 10, and Ont. Ins. Act, 1897, 60 Vic., c. 37, s. 60, ss. 2.

26b. Societies registered under s. 38 may make deposits.—The Minister, under section 37, may in his discretion exempt assessment life companies from the provisions referred to in the preceding paragraph, but there is nothing to prevent him from refraining from the exercise of such discretion, or, if such discretion has been already exercised, from withdrawing the exemption with respect to such of the provisions as are in their nature applicable to companies of this description; and there is nothing in the provisions requiring a deposit which renders it inapplicable to such companies. On making a deposit, a license would issue to the company, and it would be scheduled as a licensed company, and not as a company registered under section 38.¹

27. Accident insurance.—Although accident insurance has been stated by some to be a form of life insurance, and to be governed by the same principles of law, yet from the fact that the very nature of the contract is, as its name implies, based on “accident,” it might with as much and perhaps more reason be classed among fire and the numerous other forms of insurance the foundation of which rests on chance, and in which one party to the contract, the assured, fulfils his obligation at the beginning of the agreement by paying the premium stipulated for, while the other party, the company, may perhaps never be called upon to make even the slightest return. The only reason, therefore, why accident and life insurance have been held to belong to the same category seems to be that in both cases the pecuniary value, as it were, of human life is involved. In life assurance, however, the return of the capital for which the annual premiums are the consideration is a certainty, it being merely a question of time, while in accident insurance a person may carry and pay for a policy a whole lifetime, and neither he nor his heirs may ever receive the equivalent or any portion of the money thus paid to the company. The element of chance plays as great a role in accident as in fire and other kinds of insurance, and in this respect accident insurance really is not a form of life insurance, but fundamentally different from it and more akin to the other forms of insurance. Like the latter, it is a contract of indemnity between two parties, according to which one party, in considera-

¹ Per R. Sedgwick, Q.C., Dep. Min. of Justice, Nov. 19th, 1890; Report of Supt. of Ins., 1891; and see as to deposit by friendly societies, Ont. Ins. Act, 1897, 60 Vic., c. 36, s. 43.

tion of the payment of a certain amount of money, called premium, engages to indemnify the other up to a certain amount stipulated in the policy, in the event of bodily injury or death as the result of accident.

27a. Definitions of accident.—In Ontario, in every contract of insurance against accident or casualty or disability, total or partial, the event insured against is deemed to include any bodily injury occasioned by external force or agency and either happening without the direct intent of the person injured or happening as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger.¹

In Quebec, a fortuitous event is one which is unforeseen and caused by superior force which it was impossible to resist.²

Accident has been defined in the United States to be any unexpected event which happens as by chance or which does not take place in the ordinary course of things.³ In accident insurance proper, "accident" means a bodily injury happening without the direct intent of the person injured, even though it be the indirect result of his intentional act. It, therefore, includes an injury intentionally inflicted by another; also, an injury that the negligence of the person insured contributed to produce.⁴ The meaning of the term "accident" is frequently restricted in insurance contracts. Thus it is usual to provide for insurance against injury occasioned by "external violent and accidental means," and to except "intentional injuries inflicted by the insured or any other person," and also injuries happening from "voluntary exposure to unnecessary danger."

In Ontario, however, no variance from the obligation or liability of the company as set out in the above clause is allowed.⁵

The Supreme Court of California has deemed it settled by the authorities that "accident" in these policies must be given its popular meaning; that is, a casualty, something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured. They, therefore, held, in a case where the evidence left it doubtful as to whether the death of the insured was

¹ Ont. Ins. Act, 1897, 60 Vic., c. 36, s. 152. ² C. C. L. C., 17, ss. 24.

³ North Am. Co. v. Burroughs, 69, Pa. St., 43.

⁴ Cooke on Life Ins., 79; Mut. Acc. Ins. Ass. v. Barry, 131 U. S., 100.

⁵ Ont. Ins. Act, 1897, 60 Vic., c. 36, s. 152.

caused by a fall or by a blow struck by a third person, that in either case, the death was caused by "accidental means" within the general terms of the policy. They also construed the provision that the insurance should not extend to any cause of death unless the claimant under the policy should establish, by direct and positive proof, that the death was caused by external violence and accidental means, and was not the result of design, either on the part of the insured or of any other person, to merely state as a condition that the death shall not be caused by the act of one whose design was to cause death by the act, and did not include every case where a blow, not intended to kill, unfortunately and undesignedly produced death.¹ An accident insurance, with the provision that the injury shall be occasioned by "external" causes, has been held to cover an injury to the spine caused by lifting a heavy burden in the course of business.²

According to Griswold,³ accident insurance, as the name indicates, is a contract of indemnity for injuries to the person, arising from purely accidental causes only, and of which the body, as a rule, shall present some visible sign. Under the clauses of the policy the proximate cause of death or injury must be the result of external, violent, accidental causes, without contributive negligence or voluntary exposure to unnecessary danger or peril by the insured.

He defines accident as an event, the occurrence of which is unexpected and uncommon; the happening of which is without the concurrence of the will of the person by whose agency it may be caused; without human agency. The foundation of all claims against underwriters is accident; those events which no human providence could foresee. But accident is not that which happens through the defects or perishable nature of the subject at risk; or through the act or fault of the owner of any property.⁴

27b. What the term "accident" includes.—Mr. Hunter points out that accidents are of two kinds: First, those that befall a person without any human agency, as the killing of a person by lightning. Here the elemental properties of lightning and its flash are not caused or controlled by human agency; but the fact

¹ *Richards v. Travellers' Ins. Co.* (1891) 87 Cal., 170; and see *Ripley v. Pass. Ass. Co.*, 2 Big. Life & Acc. Ins. Cases, 738, for an approved discussion of "accidents" as meant in these policies.

² *Besch*, § 245. ³ § 6. ⁴ § 5.

that the person was struck, by unintentionally placing himself within its range, is as to him an accident. Second, those that are the result of human agency. The latter are divided as follows: First, that which happens to a person by his own agency, as if he is walking or running and accidentally falls and hurts himself. Here he falls by reason of his agency in walking or running; but he did not intend to fall. He did not foresee that he would fall in time to avoid it. The fall was therefore accidental. Second, that which befalls a person by the agency of another person without the concurrence of the latter's will; as where one standing on a scaffold unintentionally lets a brick fall from his hand, and it strikes a person below. Here the dropping of the brick, as it was not intended by the former, and was unforeseen by the latter, is in the broadest sense an accident. Third, that which a person intentionally does, whereby another is unintentionally injured; as where one intentionally fires a gun in the air, and accidentally shoots another person. Here the act of firing the gun was intentional, but the shooting of the person was unintentional. Therefore, on the part of the person firing the gun the shooting of the other would be accidental, though not in as broad a sense as in the former case, because some part of his act was intentional; but, as to the person shot, it was by purely accidental means. Fourth, so also, probably, if one person intentionally injures another, not as the result of a rencontre or the misconduct of the latter, but unforeseen by him, such injury as to the latter, although intentionally inflicted by the former, would be accidental. When the injury is not the result of the misconduct or the participation of the injured party, but is unforeseen, it is as to him accidental, although inflicted intentionally by the other party. In other words, it is not regarded as essential, in order to make out a case of injury by accidental means, so far as the injured party is concerned, that the party injuring him should not have meant to do so, for if the injured party had no agency in bringing the injury on himself, as to him it was unforeseen, a casualty; it seems clear that the fact, that the deed was wilfully directed against him, would not militate against the proposition that as to him the injury was brought on by "accidental means."¹

Accident, then, is a bodily injury happening without the

¹ *Hutchcraft's Executors v. Travelers Ins. Co. of Hartford* (Ky. C. of Appeals, 1888), 18 *Ins. Law Jour.*, 315; 87 *Ky.*, 300.

direct intent of the person injured, even though it may be the indirect result of his intentional act.¹

An accidental bodily injury may include a series of events, some of which, if considered separately, would not be regarded as accidental bodily injuries,² as where a wound did not of itself cause death, but did cause the assured to fall into the water, where he was drowned. So also bodily disease may be a link in the chain of circumstances, though such disease or condition of the body itself does not come within the definition of accident.³ In this case, "death from the effects of injury caused by accident" was held to include death from pneumonia caused by a cold that would not have happened but for the weakened condition of the assured produced by the accident.⁴

27c. Exposure to danger.—If the injury happens as the indirect result of the assured's intentional act, such act must not amount to voluntary or negligent exposure to unnecessary danger. The following have been held to be within the exception of voluntary exposure to danger:—Driving alone on a dark night in a network of railway tracks;⁵ crossing railway track on a dark, rainy night;⁶ walking on railway track;⁷ crossing railway track in front of approaching train;⁸ being thrown while standing on steps of a railway car in motion;⁹ riding on the platform of a railway car, but otherwise if impelled by nausea or overcome by heat within the car;¹⁰ injury by breaking of rope by which assured was escaping from police officers.¹¹ In *Schneider v. Provident Co.*¹²

¹ *Mutual Accident Assoc. v. Barry*, 131 U. S., 100, 121, a case of injury caused by jumping from platform; *North American Company v. Burroughs*, 69 Pa., St. 43. See as to injury happening while exercising with Indian clubs, *McCarthy v. Travelers Co.*, 8 Ins. Law Jour., 208; or while lifting burdens, *Martin v. Travelers Co.*, 1 F. & F., 505. ² *Mallory v. Travelers Co.*, 47 N. Y., 52, 2 Ins. L. J., 839.

³ *Isitt v. Railway Passenger Co.*, L. R., 22, Q. B. D., 504.

⁴ See also as to apoplexy resulting from injuries, *National Benefit Assoc. v. Grauman*, 107 Ind., 288. See also *Snyder v. Travelers Co.*, 7 Ins. L. Jour., 23; *Sinclair v. Maritime Passengers Co.*, 3 E. & B., 478, in which it was held that sunstroke was not an accident; so also *Dozier v. Fidelity & Casualty Co.*, 20 Ins. L. Jour., 794.

⁵ *Neill v. Travelers Co.*, 12 S. C. R., 55. ⁶ *Travelers Co. v. Jones*, 80 Ga., 541.

⁷ *Tuttle v. Travelers Co.*, 134 Mass., 175.

⁸ *Cornish v. Accident Co.*, L. R., 23, Q. B. D., 453.

⁹ *Box v. Railway Passenger Co.*, 56 Iowa, 664.

¹⁰ *Marx v. Travelers Ins. Co.*, 18 Ins. L. Jour., 727.

¹¹ *Shaffer v. Travelers Ins. Co.*, 19 Ins. L. Jour., 285. See also *Tucker v. Mutual Benefit Co.*, 50 Hun., 50; *National Benefit Assoc. v. Jackson*, 114 Ill., 533, a case of death in course of employment; *Mair v. Railway Passenger Co.*, 37 L. T. R., 356.

¹² 24 Wis., 23.

exception was held not to include injury while getting on train in motion at a rate of speed less than that of a man walking;¹ nor does it include death from stepping from a train through a hole in a bridge.² Whether the assured voluntarily exposed himself to unnecessary danger is a question for the jury,³ and in cases where the defence is set up that the act of the assured amounted to voluntary exposure to unnecessary danger, the burden of proof is on the insurer.⁴

27d. Employers' liability insurance.—While accident insurance had its origin in the idea of securing a person from pecuniary loss he might sustain as a consequence of accidental injury to himself or to protect his family in case death should be caused by such accident, it was soon found that the same plan might with advantage be extended.

In view of the numerous decisions recently rendered holding employers of labor responsible for injuries sustained by their employees and the great risk incurred by the employer, who was exposed to heavy losses at any time through accidents happening to persons in his employ, and this without any wilful neglect or carelessness on his part, it seemed only natural to attempt a transfer of this liability to the broad shoulders of an insurance company, as the carrying of such a risk was evidently one of its legitimate functions, and thus it was not a very great step from personal accident to employers' liability insurance.

This kind of policy has also been subdivided into several classes to meet different requirements, but the main point in all of them is that the company takes the place of the employer in the event of accident to any of his employees; it relieves him from all pecuniary liability in cases where he is either justly or unjustly held responsible for damages on account of personal injury, and also substitutes itself in all litigations brought against him for the recovery of such damages, bears the expenses of legal proceedings, and in every respect takes the place of the employer. The company would, therefore, also be entitled to any redress the assured

¹ See also *Provident Co. v. Martin*, 32 Md., 310; but see *Nadenfield v. Massachusetts Mut. Acc. Ass.*, 20 Ins. L. J., 716.

² *Burkhard v. Travelers Co.*, 102 Pa., St. 262. See *Reynolds v. Equitable Accident Assoc.*, 17 N. Y., St. Rep. 337, as to injury from lifting or over-exertion; *Stone v. U. S. Casualty Co.*, 34 N. J., 371, as to fall from building.

³ *Cotten v. Casualty & Fidelity Co.*, 20 Ins. L. J., 8.

⁴ *Freeman v. Travelers Co.*, 144 Mass., 572.

might have against anyone directly or indirectly responsible for the accident, and would in such a case be subrogated in the rights of the employer.

The extent of the company's liability is of course definitely stated in the policy ; it may be limited to the legal responsibility of the policy-holder, or it may include all and every accident met with by his workmen ; different trades and circumstances or personal inclinations may require different methods, all of which, however, are merely different shades of employers' liability insurance and a matter of detail to be arranged between the two contracting parties, and according to which the premium payable by the applicant is regulated. Both the premium and the indemnity are as a rule based upon an estimate of the annual wages paid by the employer.

If the insurance is intended to cover also accidents for which no compensation could be recovered from the employer, the latter often has a joint policy issued to protect himself and his workmen at the same time ; in such a case the premium is generally paid in full by the employer and the proportion due by the employees deducted from their wages in small instalments according to arrangement made with them.

The idea of accident insurance has been extended further to provide protection from claims for damages on account of accidents happening to persons not necessarily in the employ of the insured, but through a defective state of property belonging to him, as in the case of personal injury caused through an accident to an elevator.

27e. Elevator accident—Carelessness of employee—Employer not liable.—The plaintiff claimed \$212.50 for damages which he alleged he had suffered in consequence of an accident, of which he was the victim, on the 8th August, 1895, while employed in defendant's factory and acting in discharge of his duties. He alleged that the accident occurred in consequence of the elevator being in bad condition, to the knowledge of defendant. The defendant contested the action, alleging that he was in no way responsible, and that the accident occurred through the carelessness of the plaintiff. The court held, that it appeared from the evidence, that the accident in question could not be attributed either to the bad condition of the elevator or to any defect in it, and that it

resulted from the carelessness of the plaintiff himself. The action was, therefore, dismissed.

An action in warranty had been, however, instituted by the defendant against the insurance company, with which he had contracted to protect him from loss through accidents from his employees. The company had insured the plaintiff against accidents for which he might be civilly responsible to the workmen employed by him. The defendant in warranty pleaded, that the plaintiff had forfeited the benefit of the insurance, inasmuch as he had failed to comply with the conditions of the contract. The court held, that as the action of the principal plaintiff, Lefebvre, had been dismissed with costs by the judgment noticed above, and, being thus disposed of, there could be no occasion for a demand in warranty, but the question of liability for costs remained to be settled. As to this point the court held that the principal action was based on the *quasi delit* charged against Ramsay, and the action in warranty was based on a contract between the principal defendant, now plaintiff in warranty, and the defendant in warranty. These two demands arose from obligations which were entirely distinct and had no connection. The court was of opinion that the present plaintiff in warranty should have instituted a distinct action. Under the circumstances the principal plaintiff could not be condemned to pay the costs of the action in warranty, and, therefore, the action in warranty was dismissed with costs against the plaintiff in warranty.¹

28. Burglary insurance.—One of the more recent kinds of insurance against certain contingencies is called “burglary insurance,” which is also a contract of indemnity, one party, the company, contracting to indemnify the other party, the insured, upon payment of a certain premium against loss he may suffer by losing through burglary certain specified property within the terms of the policy.

The following remarks of Mr. Justice Dugas, in the very recent case of John A. Grose, prosecutor, *vs.* John B. Wood, on the nature of burglary insurance, are of interest :

“ I have before me a case of John A. Grose, against John B. Wood, who is sued for having issued, on behalf of a company, a

¹ Lefebvre v. Ramsay, S. C., Montreal, 9 Jan., 1897; Tellier, J., & Ramsay v. Manuf. Ins. Co., *id.*, and see index, § *infra*, Whyte v. Manuf. Acc. Ins. Co., 26 O. R., 153.

policy of insurance without a license. Section 22 of the Insurance Act of Canada reads, that every person who delivers any policy of insurance or interim receipt, or collects any premium or carries on any business of insurance on behalf of any life, fire, or inland marine insurance company, without such license as aforesaid, shall, on summary conviction thereof before any justice of the peace, or any magistrate having the powers of two justices of the peace, for the first offence incur a penalty of not less than \$20, and not more than \$50, and in default will be imprisoned in jail. There is a certain limitation in that section which does not exist in virtue of an amendment under section 49, which says that no company or person shall issue any policy other than a life, fire, or inland marine insurance policy, or receive any premium in respect thereof, or carry on any business of insurance other than life, fire, or inland marine insurance, without first obtaining a license from the Minister to carry on such business in Canada, etc.; and subsection five of the said article 49, adds that every company or person carrying on such business without obtaining such license, or after such license is revoked, or neglecting or refusing to make the statements required, and every person who delivers any policy of insurance or collects any premium on behalf of such company or person, shall respectively incur the penalties mentioned in the 21st and 22nd sections of this Act.

"I thought at first that there might be an objection taken from the fact that it is the vice-president of the Holmes Electric Protection Company who had been sued, and not the company itself, but I see that by this subsection of article 49 there cannot be any doubt that anybody who delivers a policy on behalf of such company doing such a business, and who has not the license required by law, becomes responsible under section 22 as if it was the company itself.

"Now all the facts are admitted in this case, but the defendant, has raised the point that this guarantee given by Wood on behalf of the Holmes Electric Protection Company, Limited, is not a contract of insurance in the sense of the law, and that, therefore, that company was not obliged to take out a license under the sections as cited. Amongst other authors he cited Faure and Herman, who give the ordinary definition of what an insurance is, and which definition is perfectly well known.

"An insurance is a contract by which one party undertakes

to pay a certain amount of money in the event of certain casualties; that is, one binds himself to pay a certain amount which is fixed, and the other binds himself to pay an amount if such and such an event should happen. There are different classes of insurance, those against fire, life, storms; and there is even an insurance against the breaking of glass—that is, the proprietors of houses are insured against the breaking of large glasses in their premises, either accidentally or maliciously. Lately an insurance, which was not known in France, and which has lately become known in the United States and Canada, that is, insurance against burglary, has been added to the list of the different insurances known until then. Therefore, there is no doubt that, according to our law now, there is the insurance against the depredations which may be committed by burglars. Mr. Grose represents a company which has been duly licensed and exists in accordance with the law. He accuses Wood, who is the vice-president of the Holmes Electric Protection Company, of having delivered a policy of insurance issued by the Holmes Electric Protection Company, Limited, that company not being licensed in the proper way as ordered under the sections of the Insurance Act already quoted. The agreement reads as follows :

“ ‘This agreement made between the Holmes Electric Protection Company, Limited, party of the first part, and Simpson, Hall, Miller & Co., parties of the second part, witnesseth that the party of the first part, in consideration of the payment hereinafter mentioned to be made by the party of the second part, agree to attach to store No. 1749 Notre Dame street, city, their system of protection against burglary by means of wires and attachments, supplying the necessary instruments, etc.’

“ The contract goes on to add what should be done supposing some of these accidents should happen.

“ This agreement is made for a period of three years, to date from the 3rd October, 1894.

“ This is all that is mentioned in this agreement. I may say that if I can see through it, this is a means which has been adopted with the hope of escaping the dispositions of the law so as to make it, on the face of it, doubtful as to whether this is the real policy or not, because we do not see that in this first writing, in this first contract signed by the Holmes Electric Protection Company, that they fix the amount which is to be paid by the company

in the event of there being a burglary committed at Simpson, Hall, Miller & Co.'s place of business, but the only thing is that they undertake to superintend or protect the building in question upon Simpson, Hall, Miller & Co. paying \$10 per month during the contract, that is, during three years. But there is another writing, made on the same day, that is, the 6th of August, 1894. This writing is as follows :

“ ‘ *Messrs. Simpson, Hall, Miller & Co., city.*

“ ‘ GENTLEMEN,—In connection with contract signed this day, it is agreed that we will make good any loss caused by burglary while your establishment is under our protection, in a sum not to exceed \$2,500.

Yours truly,

“ ‘ Holmes Electric Protection Co., Ltd.,

“ ‘ J. B. Wood, *Vice-President.*’

“ It is pretended that this is only a contract of guarantee, and that there is no insurance in this business. I cannot see that. Referring to the very authority which has been cited by defendant, the contract of insurance has no particular form, a simple understanding verbally is sufficient ; an understanding in writing, which contains all the ingredients of a contract or policy of insurance generally, is, therefore, exactly the same as a policy of insurance issued in the well-known form. Here, in this first contract, Messrs. Simpson, Hall, Miller & Co. undertake to pay \$10 a month, though I think it has been established that the whole was for \$150. At all events, taking this written contract, they have to pay \$10 a month during three years, which makes \$120 a year, and they are protected against any casualties or loss committed at their store, by its being broken open and robbed by burglars. It is true that in this first contract the Holmes Company do not say what they will do supposing this should happen, but in this second contract, which is a supplement to the first one, there it is stated that in the event of such casualties and referring to the first contract by which they agree to pay a certain amount, that they (the Holmes Company) will pay an amount not to be more than \$2,500. That is, if you prove that you have been robbed of that amount, we will give you \$2,500, or in other words, should it be proved you have suffered this loss, we will pay you the damage which you may have suffered. This is a simple contract, and although in terms other than those generally used in policies, yet it contains all the ingre-

dients of a policy of insurance with the payments fixed at so much a month, that is, in this case \$120 a year. During that time defendants keep the party insured against any robbery which may take place at their establishment, which is designated, and should loss happen, they undertake to pay and reimburse the loss which might be suffered thereby, provided it does not amount to more than \$2,500. This is not a simple contract of guarantee, but it is a contract of insurance in the proper form.

"I may add that this disposition of the law which required a license to be taken, is a matter of public interest. The public is interested in seeing that those who undertake to insure, whether it is against fire, or whether it is life assurance, or against burglary, or whether it is against storms or in any other form of insurance which is admitted by law, the public is interested in seeing that these companies have conformed to all the dispositions of the law, this being security that they are in good standing, and will be able to fulfil their engagements and obligations. The Minister of Justice issues the license, but he issues it only after he has seen that the company has complied with all the requirements of the law, and that the public is sufficiently protected against loss.

"Therefore, Wood is condemned to pay \$50 and costs or two months' imprisonment. I would not put the full amount if I did not consider it a matter of public interest, but in matters of public interest I think the highest penalty should be imposed."¹

The learned judge was in error in stating that the Minister of Justice issues the licenses; all licenses under the Insurance Act are issued from the Finance department, signed by the Minister or Deputy Minister and the Superintendent of Insurance. It is to be noted that the company on whose behalf the defendant in the above case assumed to contract, was incorporated under the Canada Companies' Act, and that under said Act a company cannot be legally organized for the purpose of transacting any form of insurance, that business being one of those specially excepted.²

This judgment was affirmed by the Court of Queen's Bench, at Montreal, Mr. Justice Würtele, 30th March, 1896.

In rendering judgment, Würtele, J., said: "The informant, on the 30th day of May, 1896, laid an information against John B. Wood, accusing him of having illegally delivered, as the Vice-

¹ See Report of Superintendent of Insurance, 1894. ² Idem.

President of the Holmes Electric Protection Company, to the firm of Simpson, Hall, Miller & Co., on the 6th day of August, 1894, at the City of Montreal, a certain policy of insurance, guaranteeing the firm against any loss it might incur from burglary, to the extent of \$2,500.

“The information was laid under section 49 of the Insurance Act, as replaced by section 15 of the Act 57-58 V., c. 20, which amends the Insurance Act. This section enacts, that no company or person shall issue any policy of insurance other than a life, fire or inland marine insurance policy, without having first obtained a license from the Minister of Finance, and, further, that every person who so delivers any policy of insurance shall incur a penalty not exceeding \$50 and costs, and not less than \$20 and costs, and that, in default of payment, the offender shall be liable to imprisonment, with or without hard labor, for a term not exceeding three months, and not less than one month. Section 22 of the Insurance Act gives jurisdiction to any two Justices of the Peace, or to any Magistrate, having the powers of two Justices of the Peace, to try any person charged with the commission of this offence, in a summary way.

“The case was heard before Judge Dugas, one of the Judges of the Sessions of the Peace, acting in and for the District of Montreal, and on the 14th June, 1895, the defendant was convicted by him for having committed the offence with which he was charged, and was adjudged for such offence to pay a fine of \$50 and the sum of \$7.60 for costs, and it was further adjudged that, in default of payment, the defendant should be imprisoned for the term of two months. The defendant thereupon appealed to this Court from this conviction.

“It appears that the Holmes Electric Protection Co., Limited, was organized and incorporated for the purpose of protecting premises in cities where it carried on business, against fire and burglary, under a system of protection by means of wires and attachments connected with its central office, and that, on the 6th August, 1894, it entered into a contract with the firm of Simpson, Hall, Miller & Co., by which it was to attach its system of protection against fire and burglary to their premises, in consideration of a monthly payment of \$10, for the term of three years, from the 3rd October, 1894, and that, at the same time, it was further agreed between the parties, in connection with the contract signed

that day, that the Holmes Electric Protection Company, Limited, would make good any loss caused by burglary, while the establishment of the firm should be under the company's protection, in a sum not to exceed \$2,500. The company, in the first place, agreed to place the wires and attachments forming their system of protection in the premises of the firm, but did not guarantee that such system would remove all danger and risk of fire and burglary; then, by the subsidiary contract entered into at the same time, the company guaranteed the firm against any loss which might be caused by burglary, to the extent of \$2,500. These two documents were then delivered by Mr. Wood, in his capacity of vice-president of the company, to Mr. Whimby, the manager of the firm, and it is admitted that, when they were so delivered, the company did not have a license from the Minister of Finance to carry on, in Canada, the business of insuring property against loss by burglary.

"On the other hand, the appellant contends that the contract entered into was not a contract of insurance, but only a contract of guarantee, while, on the other hand, the respondent maintains that the contract entered into by the parties was, in reality, a contract of insurance.

"Article 2468, C.C., defines the contract of insurance as a contract whereby one of two parties undertakes, for a valuable consideration, to indemnify the other party against loss or liability from certain risks or perils to which the object of the contract may be exposed. The first party is the insurer and the other party the insured. Now, in the present case the object of the contract was the property of the firm contained in the premises described in the agreement, and the undertaking entered into by the company was to indemnify the firm against any loss which might occur, during the existence of the contract, by burglary. The fact that by the contract the company were to place in the building an apparatus for the purpose of giving notice of any attempts to burglarize the premises does not alter the nature of the undertaking entered into by the company to indemnify the firm for loss by burglary. It merely lessens the risk of the insured being robbed, and the risk of the insurer of being called upon to indemnify the insured for losses which might be so incurred, but that is all. The monthly payment of \$10 was the valuable consideration, both for the leasing of the apparatus required for the company's system of protection and for the contract of insurance.

"I hold that a contract of insurance was entered into between the two parties, and that the two documents delivered by Mr. Wood to Mr. Whimby constituted, together, the policy evidencing the existence of such contract of insurance. As it is admitted that the Holmes Electric Protection Co., Limited, had never obtained, and did not hold, a license from the Minister of Finance when Mr. Wood, on its behalf, issued and delivered the policy in question, he is guilty of having violated the provisions of Sec. 49 of the Insurance Act, and has incurred the penalties imposed by it for such violation.

"He was, therefore, rightly convicted by the Judge of the Sessions of the Peace for having committed the violation of the law of which he was accused, and properly adjudged to pay the sum of \$50 as a fine, with \$7.60 for the costs incurred, and, further, to be imprisoned for the space of two months, unless such sum and costs should be paid.

"The conviction is, therefore, confirmed, and the appellant is condemned to pay the costs of the appeal."

29. Various other insurances.—Amongst the other forms of casualty insurance, the most prominent are those covering damage caused by the breaking of glass, damage done to vehicles, the explosion of boilers, the destruction of crops on the field through hail-storm, and the death of domestic animals (live stock.) All of these are contracts of indemnity, in which the company binds itself, upon payment of a stipulated premium, to make good the loss caused to the policy-holder by the impairment or destruction of the objects insured, within the period named in the policy.

29a. Definition of plate-glass insurance.—The covering of plate-glass from loss by accidental breakage, but not from loss by fire, earthquake, or during alterations and repairs to the building. A plate-glass policy is not a co-contributor with a fire policy covering plate-glass.¹

29b. Negligence in replacing glass.—In a very recent American case a casualty company insured plate-glass in plaintiff's building. The policy provided that the company, at its option, might replace the glass or pay its actual value, and that, whenever necessary, insured should, at his own expense, remove any woodwork, gas

¹ Griswold, 473.

fixtures, or other obstructions to the replacing of the glass. The company notified one H., with whom it had a contract for that purpose, to replace plaintiff's broken glass. H.'s workmen found that the gas pipes interfered with the work, and negligently detached two lengths in the cellar, so that when the gas was lighted in the evening an explosion occurred which damaged plaintiff's property. Held, that the casualty company was not liable for such negligent acts.¹

30. Fidelity insurance.—Fidelity insurance, in its ordinary sense, is the giving of bonds to employers by insurance companies to indemnify them against pecuniary defaults of employees. Such bonds are usually made for periods not to exceed twelve months, and the bonds stipulate that the default must occur within the actual period covered by the bond or within a limited period after the expiry of the bond or of any renewal thereof. Usually the period of grace does not exceed three months.

31. Title insurance under Pennsylvania statute.—The statute of Pennsylvania upon the subject of title insurance provides that "companies incorporated under the provisions of this Act, for the insurance of owners of real estate, mortgages and others interested in real estate from loss by reason of defective titles, liens and encumbrances, shall have the power and right to make, execute and perfect such and so many contracts, agreements, policies and other instruments, as may be required therefor." One whose title to real estate had been insured by a company organized under this statute, having been subjected to litigation by reason of the title he held, and consequent expense, and loss of a sale of the property, brought an action against the insurer for indemnity. The insurer interposed as one of its defences that, as the conveyancing was done by the insured's conveyancer, the insurance company was not liable. The court held that this was not a good defence to the action. The judge thus declared as to the powers of such companies:

"This objection overlooks the fact, that the insurer insured the title as attempted to be conveyed by the deed from the grantors, and mentioned that deed in the policy. This defence is based on the notion that not only may title insurance companies

¹ *McCauley v. Fidelity & Casualty Co. et al.*, N. Y. S. C., 38 New York Supplement, May 14, 1896, 773.

do conveyancing, but that they must be employed to do it, in order to hold them on their policies. This is a great mistake. They have no right whatever to do conveyancing, draw deeds, write wills, or the like. Their conduct in this respect is a usurpation on the commonwealth. No Act of Assembly authorized them to do any such acts, and in these days of corporate greed it is well to remind them that the law under which they are allowed to insure titles, and to make such contracts, agreements, policies and other instruments as may be required therefor, authorizes them to make and perfect only such contracts as may be required to insure titles, and not to make and convey them. The argument that, unless they are permitted to draw deeds and convey titles, they will have none to insure, is as specious as would be an argument that a fire insurance company should be allowed to make contracts to build houses in order to insure them. The consequence of the usurpation is not only the diversion of their legitimate business from lawyers and conveyancers, but the best school of the students of law, the law of real estate, is being destroyed. Knowledge of the foundation of the law and accuracy and precision in the use of law language is becoming obsolete. It is bad enough that such usurpations are tolerated without interference, but it is much worse to see the denial of them set up as a defence on a policy of insurance which the company is authorized to issue, and on which, as in this case, it is clearly liable." This rule was given as to damages in such cases: "On the question of damages, as this is a case of total loss of title, there is but one measure to be applied, and that is, the value of the property lost. This is not a case of defective title, or an incumbrance requiring removal, in which the insured would be entitled to recover the costs and expenses incurred in curing the defect or removing the incumbrance."¹

¹ *Gauler v. Solicitors' Loan & Trust Co.* (1891), 9 Pa. Co. Ct., 634.

CHAPTER III.

POWERS OF PARLIAMENT AND THE LOCAL LEGISLATURES OVER SUBJECT MATTER OF INSURANCE.

32. DOMINION NO POWER TO AUTHORISE CONTRACTS EXCEPT SUCH AS ARE SANCTIONED BY PROVINCIAL LEGISLATURE.

33. DOCTRINE IN THE UNITED STATES.

34. APPLICATION OF INSURANCE ACT OF CANADA AND UNCONSTITUTIONALITY OF SOME OF ITS PROVISIONS.

35. SUPERINTENDENT AND INSPECTORS OF INSURANCE—THEIR POWERS AND DUTIES.

36. JURISDICTION OF PARLIAMENT DISCUSSED IN SUPREME COURT AND PRIVY COUNCIL.

37. PROVINCE EXCLUSIVE JURISDICTION OVER LEGISLATION REGULATING FALSE STATEMENTS IN APPLICATION, ETC.

38. UNCONSTITUTIONAL PROVISIONS OF INSURANCE ACT OF CANADA REGARDING ERROR IN AGE, MISSTATEMENTS, ETC.

39. CONTRACT DEEMED MADE IN ONTARIO.

40. APPLICATION OF ONTARIO FIRE INSURANCE POLICY ACT.

32. Dominion no power to authorise contracts except such as are sanctioned by provincial legislation.—The parliament of the Dominion has no power to authorise a company of its own creation or a foreign company to make contracts in a province, except such contracts as the legislature of that province may choose to sanction. The legislature may, if it thinks proper, exclude such corporations from entering into contracts of insurance in the province altogether, or it may exact any security which it may deem reasonable for the performance of the contracts. The artificial being created by the foreign or Dominion charter is authorised to make such contracts as may come within its designated purposes, but parliament granting the charter can give no privileges to be exercised within any of the provinces except with their assent and recognition, and it follows as a matter of course that these may be granted upon such terms and conditions as the provinces think fit to impose. Within their respective limits each legislature is supreme and free from any control of the other. The Dominion parliament has no more power to interfere or regulate contracts of this nature within any of the provinces than has the legislature of the province to regu-

late promissory notes or bills of exchange. The terms upon which insurance business is to be carried on within the province is a matter coming exclusively within the powers of the local legislature, and any legislation on the subject by the Dominion would seem to be *ultra vires*.¹

33. Doctrine in the United States.—In the United States the doctrine is the same, the supreme court of Michigan having in a recent case laid it down that corporations organised under the laws of other states to engage in and carry on business not open to citizens generally, cannot carry on business in the State of Michigan, except permission, either express or implied, is given them to do so. It has been repeatedly held, and there seems to be no conflict of authority, that corporations of one State have no right to exercise their franchises in another State, except upon the assent of such other State and upon such terms as may be imposed by the state where their business is done. The conditions imposed may be reasonable or unreasonable; they are absolutely within the discretion of the legislature.²

In a suit by a policy holder, however, a company is estopped to deny that it was authorised to do business in the State.³

34. Application of Insurance Act of Canada and unconstitutionality of some of its provisions.—By its terms the provisions of the Insurance Act of Canada do not apply to any policy of life insurance in Canada issued previously to 22nd May, 1868, by any company which has not subsequently obtained a license under that Act, nor to any company incorporated by the legislature of the late province of Canada, or of any province in the dominion, which carries on business wholly within that province and which is within the exclusive control of the legislature of that province. But if such a company wishes to transact business throughout Canada, it may, by leave of the Governor in Council, obtain the benefit of the provisions of the Insurance Act of Canada.⁴ And by section 4 of the same Act no one may carry on the business of insurance in Canada,

¹ See *Parsons v. Citizens Ins. Co.*, 4 A. R. 96; 4 S. C. R. 215, 7 App. Cas., 96; *Parsons v. Queen Ins. Co.*, do.; *Devlin v. Western Ass. Co.*, 4 A. R. 281, 4 S. C. R. 215; *Goring v. London Mutual Fire Ins. Co.*, 11 O. R. 82; *Bank of Toronto v. Lambe*, 12 App. Cas. 575.

² *Beach on Insurance* (1896), vol. 1, p. 51, § 60, and see as to application of statute general in its terms, to foreign company, *id.*, p. 59, § 71, and see index for § *infra*. ³ *Beach*, p. 53, § 64. ⁴ R. S. C., c. 124, s. 3.

subject to the exceptions in the Act, without a license under the Act; but the constitutionality of this, as well as of some other provisions of the Insurance Act, is doubtful, as we shall see later.¹

35. Superintendent and inspectors of insurance—Their powers and duties.—For the more efficient administration of the business of insurance in Canada, a superintendent of insurance has been appointed under the Dominion Act, and an inspector of insurance under the Ontario provincial acts.²

The Quebec provincial act provides for the appointment of an inspector, but none has so far been named.³

The powers and duties of the superintendent of insurance include the recording of the documents required to be filed by each company in the superior courts of Canada; entering securities deposited; reporting before the issuing of licenses; keeping record of licenses; visiting the head office of each company at least once a year, examining its affairs and reporting to the minister; and lastly, preparing for the minister from the statements an annual report showing the full particulars of each company's business, together with an analysis of each branch of insurance, with each company's name, giving items classified from the statements made by each company.

The inspector's duties are somewhat similar with regard to the provincial companies. If the superintendent or inspector considers that the assets of any company are insufficient to justify its continuance in business, or that it is unsafe for the public to effect insurance with it, he makes a special report to the minister (in Ontario to the treasurer), who may report to the Governor-in-Council that he agrees with the superintendent or inspector, and the Governor may then suspend or cancel the license of the company, and prohibit it from doing further business.⁴

36. Jurisdiction of parliament discussed in Supreme Court and Privy Council.—The question of the powers of parliament and of the legislatures of the provinces in insurance matters was fully discussed by the Privy Council in the case of the Citizens' Insurance Co. v. Parsons.⁵

This was a Canadian company incorporated by Act of the parliament of Canada since the passing of the R. S. O., c. 162, and it

¹ See index for § *infra*. ² Ont. Ins. Act, 1897, sec. 176. ³ R. S. Q. 5377.

⁴ R. S. C., ch. 124, sec. 25; R. S. Q., 5377; Ont. Ins. Act, 1897, sec. 179.

⁵ 4 S. C. R., 215; 7 App. Cas., 96.

had issued, in favor of P., a policy against fire which had not endorsed upon it the Ontario statutory conditions (R. S. O., c. 162), but had conditions of its own which were not printed as variations in the mode indicated by the Act. The Queen Insurance Company, an English company carrying on business under an Imperial Act, issued in favor of P., after the passing of R. S. O., c. 162, an interim receipt for insurance against fire, subject to the conditions of the company. The Western Assurance Company, a Canadian company incorporated by the parliament of Canada before confederation, issued a policy of insurance against fire in favor of J., the conditions of the policy, which were different from those contained in R. S. O., c. 162, not being added in the manner required by the statute. The three companies were authorized to do fire insurance business throughout Canada by virtue of a license granted to them by the Minister of Finance, under the Acts of the Dominion of Canada relating to fire insurance companies. The properties insured by these companies were all situated within the province of Ontario, and being subsequently destroyed by fire, actions were brought against the companies.

The Supreme Court of Canada, after hearing the arguments in the three cases, delivered but one judgment, holding that "The Fire Insurance Act," R. S. O., c. 162, was not *ultra vires*, and is applicable to insurance companies (whether foreign or incorporated by the dominion) licensed to carry on insurance business throughout Canada and taking risks on property situate within the province of Ontario; that the legislation in question, prescribing conditions incidental to insurance contracts, passed in Ontario, relating to property situate in Ontario, was not a regulation of trade and commerce within the meaning of these words in ss. 2, s. 91, B. N. A. Act; that an insurer in Ontario who has not complied with the law in question, and has not printed on his policy or contract of insurance the statutory conditions in the manner indicated in the statute, cannot set up against the insured his own conditions or the statutory conditions; the insured alone in such a case is entitled to avail himself of any statutory condition.

Per Taschereau & Gwynne, J.J. : That the power to legislate upon the subject matter of insurance is vested exclusively in the Dominion Parliament by virtue of its power to pass laws for the regulation of trade and commerce under the 91st section of the B.N.A. Act.

On appeal to the privy council, the judgment of the Supreme Court respecting the validity of the provincial statutes was affirmed ; the judgment of the Supreme Court on the merits was however reversed.¹

37. Province—Exclusive jurisdiction over legislation regulating false statements in application, etc.—In a subsequent case where the defendant, a mutual insurance company, was incorporated by an Act of the Dominion parliament, 41 Vict., c. 40, by section 28 of which it is provided that “any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant or his circumstances or the concealment of any incumbrance on the insured property, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto, shall render the policy void, it was held on demurrer, that the matters provided for by the above section were subject matters of the “Fire Insurance Policy Act” of Ontario, over which the province has exclusive jurisdiction ; and although they might be proper subjects of legal contract, they would have no force or vitality through the Dominion Act *per se*, but only by being used as required or modified by said Ontario Act, namely, in the manner provided for variations to the conditions therein contained.²

38. Unconstitutional provisions of Insurance Act of Canada regarding error in age, misstatements, etc.—The Dominion Insurance Act³ requires that any condition modifying policies of life insurance must be set out in full on the face or back of the policy ; that no policy shall have endorsed upon it a condition voiding the policy on account of an untrue statement, unless such untrue statement be material ; and that a misstatement of age made in good faith shall not avoid the policy. Except in so far as they are prescribed by provincial legislation, these provisions seem of doubtful constitutionality.⁴

It was claimed for the Dominion in *Parsons vs. the Queen*

¹ *The Citizens Ins. Co. v. Parsons*, 4 S. C. R. 215, 7 App. Cases 96.

² *Goring v. London Mut. Fire Ins. Co.* 11, O. R. 82, commenting on *Citizens Ins. Co. v. Parsons*, 7 App. Cases 96. ³ R. S. C. cap. 124, sec. 27, 28, 28a.

⁴ *Venner v. Sun Life Ins. Co.*, 17 S. C. R. 394 ; *Goring v. London Mutual Fire Ins. Co.*, 11 O. R. 82 ; *Fitzrandolph v. the Mut. Relief Society of Nova Scotia*, 17 S. C. R. 333 *infra*.

Insurance Company,¹ and held by two of the judges in the Supreme Court of Canada, that legislation regulating insurance contracts fell within the terms "trade and commerce," legislation upon which, by the British North America Act,² is within the exclusive jurisdiction of the Dominion Parliament, but this contention was rejected by the courts. Notwithstanding this rejection, we find section 39 of the Insurance Act of Canada³ providing for the regulation of life insurance contracts made by mutual or assessment companies; defining the form of their contracts and the rights and obligations flowing from them; and this although the Civil Code of Lower Canada expressly declares⁴ that mutual insurance is not commercial. In Ontario, however, it has been enacted by provincial authority⁵ that where a corporation licensed or authorised under section 39 of the Insurance Act of Canada is registered under the Ontario Insurance Act, every policy issued and used in Ontario must conform to said section 39 under penalty of suspension or cancellation of its registry. The provisions of the Insurance Act of Canada⁶ above referred to requiring the setting out of conditions in full on the policy, and that untrue statements must be material to void the policy, are also reproduced, with modifications, by Ontario provincial legislation⁷ and to some extent in Quebec⁸ also, as we shall see later in discussing the question of warranties, misrepresentations and concealments in contracts of insurance. Although section 22 of the Insurance Act of Canada provides that unlicensed persons undertaking contracts of insurance are liable to fine and imprisonment, this would seem an interference with civil rights, and consequently ineffective without provincial sanction.⁹

39. Contract deemed made in Ontario.—Under the Ontario Insurance Act, 1897,¹⁰ when the subject matter of the contract is property, or an insurable interest within the jurisdiction of Ontario, or is a person domiciled or resident therein, any policy, etc., shall, if signed or delivered over in Ontario, be deemed to evidence a contract made therein, and shall be construed according to the laws of Ontario. In Quebec, fire insurance companies may be summoned by the assured or his representatives before the court of the district

¹ See *supra*, § 36, and especially *Parsons v. Citizens' Ins. Co.*, § 36.

² B. N. A. Act, sec. 91 (2). ³ R. S. C., cap. 124, sec. 39. ⁴ C. C. L. C., 2471.

⁵ Ont. Ins. Act, 1897, sec. 59, ss. 3. ⁶ Secs. 27, 28.

⁷ Ont. Ins. Act, 1897, sec. 144. ⁸ C. C. L. C., 2480, and see index for § *infra*.

⁹ Ont. Ins. Act, 1897, sec. 53. ¹⁰ Ont. Ins. Act, 1897, sec. 143.

where the object of the risk is, and life companies before the court of the district where the assured has or had his domicile.¹

40. Application of Ontario Fire Insurance Policy Act.—The application of the Ontario Fire Insurance Policy Act, R. S. O., 1877, c. 162, to mutual insurance companies has been the subject matter of several decisions in Ontario.² And it is there held that a company incorporated by a provincial legislature for the business of insurance possesses the same capacity and franchises within the jurisdiction creating it as a company incorporated by the Imperial or Dominion parliaments, and may enter into contracts outside the province wherever such contracts are recognised by comity or otherwise.³ It has been formally decided that Dominion legislation regulating the winding up of insolvent companies is not *ultra vires* of the Dominion Parliament.⁴

¹ C. C. P., art. 34; R. S. Q., 5861.

² *Cameron v. Canada Fire & Marine Ins. Co.*, 6 O. R. 392; *Robins v. Victoria Mut. Fire Ins. Co.*, 6 A. R. 427; *Mutual Ins. Co. of Washington v. Frey*, 5 S. C. R. 82, reported *infra*.

³ *Clarke v. Union Fire Ins. Co.*, 10 P. R. 313; and see *Duff v. Can. Mut. Fire Ins. Co.*, 9 P. R. 292.

⁴ *Re Briton Medical & General Life Assn. (Ltd.)*, 12 O. R. 441; and see index for § *infra*.

CHAPTER IV.

OF THE MAKING OF THE CONTRACT, THE APPLICATION, PAYMENT OF PREMIUM AND DELIVERY OF POLICY.

41. CONTRACT BY PAROL — ACCEPTANCE MAKES VALID CONTRACT — POLICY NOT ESSENTIAL — AGGREGATION IN QUEBEC AND OLD FRANCE — IN ENGLAND — IN FRANCE — IN GERMANY.

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91. EXTRA PREMIUM TO BE PAID BY LESSEE.

92. PLACE OF CONTRACT.

93. PLACE OF PAYMENT.

94. NOTICE OF PAYMENT OF PREMIUM.

95. RENEWALS — STIPULATION, LOST OR NOT LOST.

96. ACCIDENT INSURANCE TICKETS.

41. Contract by parol—Acceptance makes valid contract.—The acceptance of an application for insurance constitutes a valid agreement to insure, unless the insurer is required by law to contract in another form exclusively.¹

41a. Policy not essential.—The policy is not essential to the validity of the contract; it is but the expression and evidence of what has been already agreed to.²

In some foreign countries, however, the policy is essential to the contract.

41b. Aggregatio mentium sufficient.—An insurance contract, like any other bilateral contract, being merely an agreement between two parties, imposing obligations upon and conceding rights

¹ C. C. L. C., 2481; 1 May, 68, § 43; Poth. Ass., 99; Marshall, 250, n.: Parsons Merc. Law, 492, n. 1; 1 Phillips Ins. 5; Montreal Ass. Co. & McGillivray, 9 L. C. R. 488. ² *Ib.*

to each, there is at common law no necessity for its reduction to writing or for the observance of any special formality. The legislature or the charter of the company, however, may require it, or it may be required by the parties as evidence of the contract.

The *aggregatio mentium*, upon all the essential points, would seem sufficient to bind the contracting parties.¹

41c. In Quebec and in old France.—In Quebec writings are required in civil matters affecting amounts over \$50, and parol evidence is admissible to complete the proof only where a commencement of proof in writing exists ; and a parol agreement to renew a policy cannot be proved without a writing or at least a commencement of proof in writing.

Mere parol proof of fire insurance is no more admitted than mere proof of the sale of lands, and in practice parol insurances are very infrequent,² except for temporary purposes pending the issue of an interim receipt or policy.

Judge Mackay has pointed out that insurance, as a commercial matter, was in old France cognizable in the Tribunals of the Juges et Consuls, and these tribunals admitted proof by parol generally even of contracts involving over a hundred livres, except where prohibited.

The Ordonnance de la Marine exacted policies, yet this was held to be only as a proof of the contract. Even under that ordinance other modes of proof were open to an insured ; for instance, the tender of the oath to the alleged insurer.³

It has been said that in Quebec, where the Ordonnance de la Marine was never registered, and where the modern French law does not control, proof of the contract may be made by policy, by other writing, by oath tendered to the insurer, and by parol, unless where the law incorporating a company orders otherwise.

And that though an Act incorporating an insurance company may direct how its policies are to be made, and confer affirmatively power to contract by policy, but is, as regards other modes of insuring, silent, such company would be held bound by a contract by parol made by any authorized agent, if evidence were furnished

¹ See *Smith v. City of London Ins. Co.*, 11 Ont. Rep. 38, 50; and *Goddard v. Monitor Ins. Co.*, 108 Mass. 57. Ont. Ins. Act, 1897, sec. 168, C.C.L., C. 2480, 2481.

² Mackay, Ins. 13 L.N., 141.

³ This is the opinion of Pothier and Merlin, though Emerigon differs from them : Mackay, Ins. 13 L.N., 142, but see *Montreal Ass. Co. & McGillivray infra*.

that it has assumed powers to make contracts so ; was in the habit of making them so by parol, and did make the one in question. From the language of the judges in the Privy Council in *Montreal Assurance Co. v. McGillivray*,¹ it would seem that the same principle might be admitted to govern even in England, though it is generally supposed that there the rule that a corporation cannot express its will but by writing under seal (except as to insignificant acts), has not been relaxed as in Quebec and the United States. It was, however, doubted by the Privy Council in that case that a parol contract of insurance was good in Quebec.²

41d. In England.—Smith states that in England all contracts of insurance must be printed or written.³ But Flanders treats of parol contracts to insure and holds they are enforceable.⁴

41e. In France.—Not even in France, where the Code de Commerce requires that the contract be reduced to writing, would a verbal agreement be *ipso facto* null and void. Any written evidence that an agreement has been made will let in oral testimony to show what the contract is.

This was the doctrine of the old law, disapproved of by Emerigon but now adopted in modern France.⁵

41f. In Germany.—The German commercial code classes contracts of insurance at a fixed rate of premium among ordinary commercial transactions,⁶ and, as the validity of commercial contracts is not dependent upon writing or any other formality,⁷ it follows that a policy is not required in Germany to make a contract of insurance binding.⁸

42. How company may contract.—An insurance company, authorized to contract in a particular mode under a statute declaring simply that contracts signed in a given way shall be binding, may nevertheless contract under its corporate seal, or in any other form which the law will allow, the statute in such case being directory only.⁹

¹ 9 L.C.R., 488. ² Id. ³ Smith on contracts, 136. ⁴ p. 133.

⁵ Rogron, Code de Com. Art. 332, note ; Alauzet, Des Ass. 181, 401, citing Pothier, Merlin, etc., Art. C.C.L.C. 1233.

⁶ Handels-Gesetzbuch, art. 271, 3. ⁷ Ib., 317.

⁸ R. O. H. G., 20 Oct., 1871, vol. 3, p. 339 ; 23 Jan., 1872, vol. 5, p. 10 ; Bill Müller, on Fire Ins. Policy, p. 3.

⁹ Safford v. Wickoff, 4 Hill's, N.Y., Rep. and observations by the Chief Justice in *Montreal Assurance Co. v. McGillivray*, 2 L.C.J., 244.

43. When parol contract will not bind company.—If a statute incorporate a company to insure, but only by policy, the company must obey the statute, and an insurance by parol by it will not bind it. But even under such statute the payment of premium to such a company and agreement by writing for a policy to be delivered afterwards after such a delay only as the necessities of business in the company's office make unavoidable, would probably operate an insurance, though a loss should happen before delivery of any policy. It would in the Province of Quebec, and it seems that it would in England, provided the written agreement were stamped.¹

44. When statutes do not expressly prohibit parol.—The language of all such statutes must be weighed ; words permitting or authorizing action by policy do not necessarily involve prohibition to act by other modes. In the Province of Quebec a company, incorporated under an Act, not expressly limiting it to contract only by policy, might sue an insured upon his note given for premiums earned on insurance by parol, and the insured would in vain plead freedom from obligation upon the pretence that no risk had ever attached upon such insurance.²

45. Parol contract in the United States.—A learned writer in the United States³ doubts whether a contract merely oral would now be sustained, since the usage of written contracts has become so ancient and so universal that it may be considered to have acquired the force of law, and this view has been adopted by the Supreme Court of Ohio.⁴ But their decision seems to be no longer an authority in Ohio itself.⁵ Corporations, however, are creatures of limited powers, and if the charter of an insurance company gives it power to issue policies of insurance, it is doubtful whether a parol contract of insurance intended to be final without any intent to issue a policy later would be valid, the insured knowing of the provision in the charter.⁶

¹ See observations of Privy Council in *Montreal Assurance Co. v. McGillivray*, 9 L.C.R. 488, and see *Mackay on Ins.*, 13 L.N., 142.

² *Mackay on Ins.*, 13 L.N., 142.

³ *Duer on Ins.*, vol. i., p. 60, and see *Millar on Ins.*, p. 30.

⁴ *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, p. 148.

⁵ *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *May on Ins.*, p. 25; *Palm & Medina Ins. Co.*, 20 Ohio 529.

⁶ *Simonton, etc., v. Liverpool, etc., Ins. Co.*, 51 Ga. 76, at 81 : see also *supra*, § 41*d*.

The provision in the charter requiring contracts to be in writing does not apply to preliminary contracts, and these although in parol can be specifically enforced even after loss.¹

46. Griswold's definition of verbal agreement and parol contract.—According to Griswold a definite verbal agreement to insure, based upon a sufficient consideration, and made by one having an insurable interest in the subject at risk with an agent having requisite authority to bind his principal by such a contract, will be legal and binding upon the insurance company, in the absence of any law to the contrary, as in some of the United States, where all contracts must by law be evidenced by writing. Such an agreement must embrace all the requisites of an ordinary insurance, such as an insurable interest, amount to be covered, duration of risk, etc. An omission of any of these points will render the agreement nugatory. All prior agreements not noted in the policy when written are held to have been waived, according to the axiom that a contract cannot exist partly in writing and partly in parol, but parol may explain a written contract when the latter is ambiguous.

Griswold³ says, further, that a parol contract, when made by a duly authorized agent, is, in the absence of any statute law to the contrary, binding upon the company; but an acceptance of the offer as made without any change must be signified, with a tender of the premium within a reasonable time, or the agreement will be void.

Insurance agreements of this character may be called a contract to issue a policy rather than a contract of insurance. Any portions of such agreement not appearing in the policy when issued are held to have been waived, unless error can be proved, in which case the policy will be subject to reform for any error of fact.

47. Recent American decisions on parol contracts—Contract in writing reformed by parol—Provision in charter not applying to preliminary arrangements.—The Maryland Court of Appeals in sustaining the right of one having a parol agreement for insurance to have decree to have it specially performed, recently declared some rules as to written and unwritten contracts of this kind.

¹ Phoenix Ins. Co. v. Ryland, 69 Md., and see C. C. L. C., art. 2481, and Porter's Laws of Ins., p. 21. ² Griswold, 32. ³ *Ib.*, 458.

They declared, for one, that although a contract has been reduced to writing, if it be clearly shown that something has been omitted from the writing which was by the agreement of the parties to have been inserted, a court of equity will reform the contract to make it conform to the original agreement of the parties. But in any such case the proof must be full, satisfactory and conclusively convincing to justify the court's interfering.

They reiterate that "a contract of insurance is an executed contract which can be enforced at law. A contract to insure is executory, and requires the interposition of equity to give effect to the agreement of parties." They then refer to the case cited below,¹ and say: "In this case the charter of the company required that all contracts of insurance shall be in writing, but the court said that this provision had reference only to executed contracts by which the company was legally bound to indemnify against loss, and not to the preliminary arrangements which necessarily precede the formal execution of the papers by the officers of the company." They then quote from Justice Field in that case as follows: "It would be impracticable to carry on its business in other cities and states, or at least the business would be attended with great embarrassment and inconvenience if such preliminary arrangements required for their validity and efficacy the formalities essential to the executed contract. The law distinguishes between the preliminary contract to make insurance or issue a policy and the executed contract or policy. And we are not aware that in any case, either by usage or the by-law of any company, or by any judicial decision it has ever been held essential to the validity of these initial contracts that they should be attested by the officers and seal of the company. Any usage or decision to that effect would break up or greatly impair the business of insurance as transacted by agents of insurance companies."²

47a. Preliminary oral contracts—Commencement of risk—Payment of premium not essential—Authority of agent—Usage. A preliminary oral contract by which it is agreed that an insurance company will insure the owner of property against a loss of that property for a fixed time, and at a rate agreed upon between the parties from the time of making the contract, and that a policy should thereafter be made out by the insurance company at its home

¹ Insurance Co. v. Colt; 20 Wall, 500.

² Phoenix Ins. Co. of N. Y. v. Ryland, 1888, 69 Md., 437, 446, 447.

office, to take effect from that time, is valid and binding upon the insurance company if made within the real or apparent scope of the agent's authority.¹ Such contracts will be enforced by compelling specific performance by the company or in action for the breach of the agreement; in either of which a recovery for the loss of the property agreed to be insured will be awarded to the assured.

In such case the risk attaches from the date of the application, or from the time designated as the commencement of the risk; and the only effect that can be given to the additional promise to execute a written policy is that, upon the tender of such a policy and a demand of the premium, the oral contract shall cease. It seems now well settled that if an application is made for insurance, whether in writing or by parol, and the risk is accepted, the contract is complete, and the risk attaches from the date of the application, or from the time designated as the commencement of the risk, and the insurance company would be liable for loss if it occurred after that and before the contract was consummated by the formal execution and delivery of the policy.

It is not considered essential unless expressly required by the agent, that the premium should be paid at the time the oral contract is entered into, in order to constitute a valid contract to insure.

Whether an applicant for insurance has a right to assume that an agent of an insurance company has authority to make such parol contracts, in the absence of notice of limitations upon the agent's authority, is a question proper to be submitted to a jury under proper instructions. The fact that an agent of an insurance company may not have authority to issue the policy, which is simply the written evidence of the contract does not of itself prevent him from making a valid preliminary oral contract to insure; and it is said in such cases the courts will take judicial notice of the usage to make such contracts date from the application.²

47b. When a parol contract is not inferred—Actual acceptance and silence.—The mere failure of a fire insurance company to respond to an application does not raise an inference that it has accepted it and insured the risk. To bind the company there must be actual acceptance. Silence operates as an assent and creates an estoppel only where it has the effect to mislead.³

¹ *Hardwick v. State Ins. Co.*, 1891, 20 Or., 547.

² *Id.*, and see *Baile v. St. Jos. F. & M. Ins. Co.*, 1881, 73 Mo. 371; *Beach*, § 493.

³ *More v. New York Bowery Fire Ins. Co.*, 1892, 130 N.Y., 537.

47c. A New York decision on parol contracts.—Usage as to credit—Authority of agents.—Where a written application had been made to a firm of brokers for insurance, the premium agreed upon, though not paid, the evidence, however, showing that the usage of the business was to extend credit to the brokers until the end of the month, these brokers being the accredited agents of the company, and a date being agreed upon from which the risk was to begin, the New York Court of Appeals held that such facts justified the inference of a complete binding agreement from the date agreed upon, which inference it was for the jury in the case to draw, and such a contract, if made, was a valid agreement for insurance upon which a recovery could be had.¹ There was some contention as to the power of these agents in this case to make such a contract. It appeared that the authority was given them in two letters, one from the company's general agent, the other from its secretary, both mailed before the making of the contract, but not received by the agents, the brokers, until after the fire. The court held that the authority dated from the mailing of the letters. Upon the subject of the authority and power of agents in such matters the court said: "The manner of conducting the business of insurance is so well known, that a person may reasonably assume that one having the apparent power of a general agent is not limited by his instructions as to the class of risks he may insure. Corporations organized under the laws of other states and having their general offices in those states, do business in this state through agents, who are intrusted with policies signed by the officers of the company, and which become binding contracts upon the endorsement of the agent. Such agents have power to make original contracts of insurance, and this mode of conducting the business is so well established that it has become a part of the common knowledge of the community, and judicial notice must be taken of it. Persons dealing with agents in good faith have the right to assume that they possess the power usually exercised by that class of officers, and unless the limitation on their authority is brought to their knowledge, the contracts made with them will be binding upon the company."²

47d. A Kentucky decision on the subject of parol contract and agent's authority.—In this case the owner of a storehouse

¹ *Ruggles v. Am. Central Ins. Co. of St. Louis* (1889), 114 N. Y. 415,

² *Ib.*

made a verbal application for insurance to the agent of a foreign insurance company. The agent and he agreed upon terms, and the agent entered the agreement in his register book, and deferred delivering a policy, stating he would deliver it when he received the usual blanks from the home office. A few days afterwards he requested the applicant to make a written application to be forwarded to the company, which he did. About three weeks after the agreement the agent countersigned a policy which he had received signed, as usual, by the president and secretary, in conformity with his agreement. The night after it was countersigned the property was destroyed by fire; the policy was not delivered until two days afterwards to the insured. There was a defence that there was no contract, as the company had at their home office, upon consideration of it, rejected the written application. Notice of this rejection was sent to the agent a few days before he countersigned the policy which he delivered; it would seem, however, that he had not then received the notification of that fact. The Kentucky Court of Appeals declared these rules as to the case: The statute of frauds has no application to a verbal executory contract for the issuance of a policy of insurance, and such an agreement is binding without any written memorial. That this insurance agent, authorised to issue policies for the company against loss or damage by fire in a specified city and "vicinity," had the right to insure property in a neighboring village ten miles distant, was apparent from the fact that the company sanctioned his contracts for insuring property in that place. The verbal contract of insurance made between the company's agent and the insured was not waived by a subsequent written application for insurance. Upon this point the court said: "Although ordinarily an application for insurance would tend strongly to show the contract to insure was not completed, and that the right of a company to decline making it still existed, yet in this case the evidence is that it was distinctly agreed by the agent; the application was intended simply as descriptive of the property, and would not impair the insured's rights under the previous parol agreement nor release the company from its obligation thereby incurred; and if the application was made by the insured under such circumstances upon such assurance, we do not see how that act can now be considered as a waiver of his right to the policy already acquired by the parol contract or as a release of the company." They held also

that where an insurance agent is invested with a general authority to make contracts of insurance and to deliver the policies, the rights of the insured cannot be affected by the fact that the property was so situated that it was the agent's duty to refuse to insure it under private instructions given by the company, of which the insured, who acted in good faith, was ignorant. And where an insurance company is legally bound by agreement of its agent to issue a policy, the rejection of the application by the company's general manager cannot affect the rights of the insured whose property was destroyed before he received notice of the rejection.¹

47e. A South Carolina decision on the subject of parol contract and agent's authority.—In a very recent case the Supreme Court of South Carolina sustained the action of a trial judge in allowing testimony to show a parol agreement to insure property over the exceptions of the company. They said: "It is too late in the day, in view of the manifold forms by which obligations of insurance on property are firmly made by parol, to question the power of such companies to do so. That it may prove unwise is no argument against such a policy. These corporations are clothed by law with the right to effect insurance upon property, and unless something in their organic constitution, to wit, the charters that give them life, restrict such an exercise of contracting power, or some law of the land to the same effect (and none of these things have been brought to our attention in this case), we will not deny such power." They also held that there was no error in refusing a non-suit, because it was not shown affirmatively that the agent had the power to make this parol contract for insurance by his company. The court said: "If the company had the power, its agents could do so. It acts alone through agencies. Of course, if there had been brought home to the applicant for insurance that the company denied its agent such power, then he would have acted to the contrary at his peril. But there was no such testimony here. The judge did not err in refusing a non-suit, because a contract in all its parts was not proved. There was such a contract as bound the company, if the testimony was to be believed. We feel it incumbent upon us to make this proposition clear. We do not, as we before remarked, regard this policy of insurance companies in making contracts of insurance by parol as

¹ Howard Ins. Co. v. Owens (Ky., 1893), 21 S. W. Rep. 1037.

wise, nor do we mean to encourage such a practice. We express no opinion on that subject. What we mean to declare is, that an insurance company that has taken the money of its customers upon the promise of a policy that is never delivered cannot repudiate such an obligation by saying that the agent it appointed in writing, as in this case, with full power to represent such company in effecting policies in its name, did not have authority to perform such acts of insurance within the scope of his authority. We sympathize very heartily with the expression of Mr. Justice Miller, of the United States Supreme Court, in this case (cited below),¹ when he said: 'The powers of the agent are *prima facie* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the persons with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.'"²

47f. Parol agreement for renewal and agent's power to waive forfeiture.—The Supreme Court of Texas, in an opinion in a well considered case, have said: "There can be no doubt that an insurance company, through its authorized agent, may contract by parol for the renewal of a policy, although it may be stipulated on the face of the instrument itself that this shall not be done. There is no peculiar sanctity attached to such provisions in contracts of this character which makes them an exception to the general rule that parties to an agreement may, by mutual concurrence, change its terms at any time after its execution so as to meet their pleasure or interest. A contract of insurance may be by parol and its terms may be changed by parol, by mutual consent. It has accordingly been held in numerous decisions that though a policy be forfeited by the failure to pay the premiums according to its conditions, yet an agent duly authorized may waive the forfeiture and thereby reinstate the obligation. The cases go even further, and decide that the authority of the agent may be implied from a previous waiver of a former forfeiture of the same policy, or from a general custom of such agent to exercise such power over the contracts of the company."³ It was held in this case that where a policy of

¹ *Ins. Co. v. Wilkinson*, 13 Wall 222.

² *Stickley v. Mobile Ins. Co.* (S. C., 1892), 16 S. E. Rep. 230.

³ *Cohn v. Continental Fire Ins. Co.*, 1887, 67 Tex., 325.

insurance provides for a forfeiture upon failure to pay the premiums which are to fall due, but does not stipulate that upon such failure the overdue premiums shall be considered as earned, a demand for and payment of such premiums constitutes a waiver of the forfeiture. It is otherwise when the policy stipulated that upon default in any instalment the insurance shall cease, and the instalment shall be considered as earned. In this particular case, however, it was held that a mere demand for the payment of an overdue premium, without its payment, was not sufficient to reinstate a policy which had been forfeited for non-payment of premium.

48. Subsequent modification of the contract by parol.—It is perfectly well settled that a new and distinct oral agreement on sufficient consideration may modify the policy in any desired manner ; and the authority of the agents of the company to make such subsequent oral agreements may be inferred from the course of dealing with the insured and the recognition of such acts by the company.¹

49. A corporation may not arbitrarily enlarge its own capacity.—A corporation cannot by its own acts enlarge the capacities, privileges or rights bestowed upon it by the legislative body from which it obtained its charter or extend its own powers beyond the limits fixed by the legislature for the carrying on of business transactions by corporations, as such arbitrary extension would likely tend to lead to an abuse of the contract to the detriment of the other contracting party. In the majority of cases he is a person presumably not as versed in the details and technicalities of the questions involved in the contract as the corporation, and it is for his protection that some of the powers of the latter have been restricted as stated in the charter or by-law.

49a. A corporation may voluntarily incur liabilities.—A corporation may, however, add to its own obligations by relaxing the stringency of conditions framed in its own interest or it may voluntarily incur liabilities which it could evade, if inclined to do so, or which clearly are outside the range of those it has undertaken by its contract. In the latter case, of course, the officers of the corporation might have to face the question whether they have kept within their powers of discretion or whether they have acted

¹ May, 38, and see index for § *infra*.

ultra vires, should a shareholder see fit to object to the course of action they have taken.¹

50. Provisions of charter as to form, seal, etc.—The former holding in Quebec that the mode specified in the charter is exclusive has been overruled,² while in Ontario it is held that although under a clause in the charter which provided that “any policy signed by the president and countersigned by the secretary, but not otherwise shall be deemed valid and binding on the company,” a policy issued without the signatures was invalid and the company would not be liable in a suit upon such a policy, yet they could be compelled to execute a valid policy as of the date when this invalid policy was issued.³ Individuals are not expected to carry in their pockets the charters of all the corporations they deal with.⁴ The ancient stringency of the common law required that corporations should execute their contracts under their corporate seal, and held that they could only thus contract. But this doctrine is now obsolete.⁵ The Supreme Court of Canada has held that the company may be restrained from pleading want of seal to a policy,⁶ and though the English writer, Mr. Porter, considers the law laid down in this case doubtful, it no doubt does substantial justice and attains the end which might have been reached by a suit in equity for a proper policy.⁷ It has been recently held in England that where the charter provided that the seal of the company should not be affixed to policies except by the written order of three directors, a policy issued under seal, but without any order of the directors was valid and binding on the company; the object of the legislature being to impose on the directors the duty towards them of observing certain formalities, for the better protection of the shareholders. If they failed in that duty they would be liable for their negligence to the stockholders, but the absence of the prescribed formality would not render the contract void as against the company.⁸ So where the

¹ *Taunton v. Royal Ins. Co.*, 13 L.N., 295.

² See *Montreal Ins. Co. v. McGillivray*, 9 L.C.R., p. 488.

³ *Perry v. Newcastle Dist. Mutual Fire Ins. Co.*, 8 U.C. (Q.B.), 363.

⁴ *Lloyd v. West. Br. Bank*, 15 Pa. St., 172.

⁵ *Kents Comm.*, 288, and cases cited in *May on Ins.*, p. 26.

⁶ *London Life Ins. Co. v. Wright*, 5 S.C.R., 466, *infra* § 51.

⁷ *Porter's Laws of Ins.*, p. 23, and see *Penley v. Beacon Co.*, 7 (Grant), U.C., 130; *Mackie v. European Co.*, 21 L.T.N.S., 102, 17 W.R., 987.

⁸ *Prince of Wales Life & Educational Ass. Co. v. Harding*, 1 E.B. and E., 183, and see also *Collet v. Morison*, 9 Hare, 162.

policy is by the charter required to be under seal a policy issued without a seal may be construed as an interim receipt.¹ An endorsement not under seal on a policy under seal is a new contract.² If the charter of a company says that it shall go free in all cases of other insurances by the insured, not endorsed upon the policy under the hand of their secretary, the company cannot waive this form.³

51. Plea of want of seal a fraud, etc.—The want of a seal (though prescribed as necessary by its charter) cannot be pleaded in Canada by an insurance company. Such a plea is a fraud which a court of equity will prevent. And it would seem that if a policy is not in statutory form the company will be compelled to issue a valid one of proper date, and substitute it for the one not in statutory form. In short, as we have already said, the ancient stringency of the common law, which required that corporations should execute their contracts under their common seal, and held that they could only thus contract, is now obsolete.⁴

The leading case is that of the *London Life Insurance Company v. Wright*,⁵ in which the charter, after specifying the powers of the directors, enacted as follows: "But no contract shall be valid unless made under the seal of the company, and signed by the president or vice-president or one of the directors, and countersigned by the manager, except the interim receipt of the company, which shall be binding upon the company on such conditions as may thereon be printed by direction of the board."

J. E. W. brought an action to recover the amount of a policy issued by the appellants in favor of her father. The policy sued on was a printed form, and had the attestation: "In witness whereof, the London Life Insurance Company of London, Ont., have caused these presents to be signed by its president and attested by its secretary, and delivered at the head office in the city of London," etc. To a plea that the policy sued on was not sealed, and therefore not binding on the appellants, the plaintiff replied on

¹ *Wright vs. London Life Ass. Co., and Wright vs. Sun Mutual Life Ass. Co.*, 29 U.C. (C.P.), 221; Supreme Court, 5 S. C. R., 466.

² *Shertzer v. Mutual Fire Ins. Co.*, 46 Md., 506, 8 Ins. L.J., 72.

³ *Couch v. City F. Ins. Co. of Hartford*; *Flanders*, 49, in note; 38 Connecticut, A.D., 1872-3.

⁴ *London Life Ins. Co. v. Wright*, 5 S. C. R. 466; *Burnett v. Union Mutual Fire Ins. Co.*, 32 C. P. 134; *Wright v. Sun Mutual*, 29 U. C. C. P. 221; *Perry v. Newcastle Fire Co.*, 8 U. C. Q. B. 363; *Porter's Laws of Ins.*, 358; 1 May on Ins., p. 26, § 16.

⁵ 5 S. C. R. 466.

equitable grounds, alleging that the defendant accepted the deceased's application for insurance, and that the policy was issued and acted upon by all as a valid policy, but the seal was inadvertently omitted to be fixed, and claiming that the defendants should be estopped from setting up the absence of the seal or ordered to affix it.

It was held by the Supreme Court of Canada, affirming the judgment of the Court of Appeal, that the setting up of "the want of a seal" as a defence was a fraud which a court of equity could not refuse to interfere to prevent, without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever case it appears; and therefore the respondent was entitled to the relief prayed as found upon the facts alleged in her equitable replication.

52. Griswold's definition of "application."—A preliminary declaration made by the applicant for insurance, usually consisting of oral or written answers to inquiries, verbal or written, intended to cover all material facts or circumstances connected with the risk which the insurer should know, subject to the principle applicable to all contracts, that fraud by either party will exonerate the other from his obligation if he so elect. These "applications" are usually made upon a printed form, also called a "survey," sometimes accompanied by a "diagram" of the property, and purport to be a true plan and faithful description of the existing condition as to exposures, occupancy, value, ownership, or other material matter connected with the subject of insurance, whether chattel or real property, by which the underwriter is enabled to judge of the nature and hazard of the risk, and fix thereon an appropriate rate of premium; and as such representation the application is made the basis of the insurance contract, subject to the acceptance of the company before the contract is complete. If accepted, it is usually made a warranty and a part of the policy, and should bear the same or prior date, but not later, and the same number. It thus becomes a warranty, which a mere reference to it in the policy would not make it.

Any questions unanswered in an accepted application are held to have been waived.¹

The fact that an applicant for insurance is an illiterate person

¹ Griswold, 47.

and understands the English language but imperfectly, is immaterial, because he is not obliged to sign the application unless he understands it; but if he signs such application without asking to have it read to him, and accepts the policy, he will be bound by its conditions.¹

53. The application insured's part of the contract—Truthful representations.—The application for insurance upon which the insured's policy may be issued is treated always as his part of the contract. In short, he is expected and required to make such representations, in response to the questions which are propounded therein, as are truthful and correct, in order to enable the insurance company to judge of the quality of risk it is expected to take upon itself, and thus determine whether or not it is an acceptable risk. Good faith and truth are expected of the insured. And when an applicant stipulates in his application for a life policy that all his statements therein are material, and that falsity in any of them shall avoid the contract, a court cannot, without an enabling statute, pronounce any of them immaterial. Where the insured had stipulated in his application that the statements made by him therein were "full, complete and true" one of which was that no member of his family ever had insanity, when in fact one of his brothers was suffering from chronic dementia, the Supreme Court of Maine in a recent case held that it was immaterial that the applicant did not believe that his brother's malady was within the meaning of "insanity" as used in the application, and such false statement would avoid the policy, pursuant to a condition to that effect."²

54. "Revival application."—Where a life insurance policy has become forfeited by non-payment of premiums, and a "revival application" is made, asking that the policy be revived, and containing representations as to the insured's health, etc., during the period between the issuing of the policy and the date of the revival application, and a warranty that such representations (as well as the representations of the original application) are true, and that otherwise the insurance will be void, and containing also an agreement that the liability of the insurer is not to exist until the revival is assented to, and when the assurer afterwards assents by a written approval of the "revival application" upon such assent the New

¹ Griswold, 311.

² Johnson v. Maine & New Brunswick Ins. Co., 1891, 83 Me., 183.

Jersey Supreme Court held the original contract, with all its terms became reinstated and there was also incorporated into the contract which then arose the new terms expressed in the "revival application" and thereby the representations therein contained became part of the contract, and the truth of each was warranted. They further held that the falsity of a statement in the "revival application" that insured had not, during the period above referred to, been "sick or afflicted with disease," was not necessarily to be inferred from the fact that insured had had a "cold"; but the falsity of a statement that insured had not "consulted or been prescribed for by a physician" was shown by proof of such a prescription, although it appeared to have been given for a "cold" and the nature of the prescription did not appear.¹

55. Copy of application attached to policy.—It has also been held that the fact that an agent of an insurance company, in making out an application falsified statements truthfully made to him by the insured, would not estop the insurer from setting up their falsehood in an action on the policy where a copy of the application was indorsed on the back of the policy, and in the possession of the insured before the loss occurred, as he was then chargeable with the knowledge of its contents whether he read it or not, and, by failing to procure a correction or rescission of the contract, he became a party to the agent's fraud.²

56. When insured must examine application and policy—Misdescription by agent.—Where an agent, solicitor for an insurance company, had written the application which was signed by the insured, and described the property as a dwelling, when, in fact, it was a boarding house and saloon, as the agent well knew, and on the back of the policy there was in large type a notice that the company did not take risks on such property, it was held in Missouri that the assured was not entitled to recover in an action on the policy for a loss, as he would be presumed to know the contents of the application and policy, and the limitation of the agent's authority in the absence of fraud, of which there was no proof in this case.³

¹ Metropolitan Life Ins. Co. v. McGague, 1887, 49 L.C.L., 587.

² Johnson v. Dakota F. & M. Ins. Co., 1890, 45 N.W. Rep., 799.

³ Mensing v. Am. Ins. Co., 1889, 36 Mo. App. 602.

56a. Same subject.—The Pennsylvania Supreme Court has held that where a policy was accompanied by a copy of the application, and the insured by reading it might then have discovered that his answers were not correctly written down, this was a consideration to be addressed to the jury; for the company could not repudiate the fraud of its agent in transcribing the answers of the insured in his application, and thus escape from its contract, merely because the insured in good faith accepted the act of the agent without examination.¹

57. What is not a part of the contract—Endorsement without reference.—While an endorsement on the back of a policy may be regarded as part of the contract, provided it is referred to in the policy as constituting part of it; if there be no reference whatever to it in the policy, nothing to show that the parties meant it to be a part of the contract, it will be regarded merely as the act of the insurer, and not therefore binding on the insured. Upon this doctrine the Maryland Court of Appeals held an endorsement on the policy involved here that whenever any alteration is to be made in the property the insured shall make application to the secretary or agent, who shall examine the property and certify whether the hazard be thereby increased or not, not to be binding on the insured; for, said the court, “in this case there is no reference either in the policy or in the by-laws to the direction or endorsement on the back of the policy, and it cannot therefore be regarded as part of the contract. It is what it professes to be, merely directory and not obligatory. And, besides, it does not provide for a forfeiture of the policy upon the failure on the part of the insured to make such application, and forfeitures by implication are not favored.”²

58. Griswold's definitions of policies.—Under the heading “Policy of insurance,” Griswold³ says: “By 10 Anne, chap. 26, sec. 68, A. D. 1712: All deeds, instruments and writings for payment of money upon the loss of any ship or goods, or upon any loss by fire, or for any other purpose for which any writing commonly called a policy of assurance or insurance is or hath been usually made, are to be deemed ‘policies of assurance.’”

The Stamp Act, A.D. 1870, says: “The term ‘policy’ in-

¹ *Kister v. Lebanon Mut. Ins. Co.*, 1889, 123 Pa. St. 553.

² *Planters' Mut. Ins. Co. of Washington Co. v. Rowland*, 1886, 66 Md., 236-240.

³ 474 et seq.

cludes every writing whereby any contract of insurance is made or designed to be made, or is evidenced, not including sea insurance."

The policy of insurance is but the form and embodiment, the expression and evidence of what has been agreed upon, adding nothing thereto and detracting nothing therefrom.

A policy of insurance is not an insurance upon the property covered thereby, but simply an agreement to indemnify the policy-holder against loss by the destruction of such property by fire.

All policies are considered in law to be either "on interest" or "wager," and to be either "open" or "valued" as to the amount written.

58a. Interest policy.—An "interest" policy represents a real, substantial, assignable and insurable interest in property covered by the policy, subsisting in the insured at the time of the issue of the policy and at the time of any loss thereunder.

58b. Wager or gaming policy.—A "wager" or "gaming" policy¹ is pretended insurance, where the policy-holder has no real interest at stake in the subject of the insurance, and, consequently, he can sustain no injury from any loss thereof. Such insurances are now void in law.

58c. Open policy.²—An "open" policy is one where the value of the property at risk is open to proof after loss.

58d. Valued policy.³—A "valued" policy is one wherein an exact value is placed upon the property covered at the time of the insurance, and such fixed value will govern the adjustment in cases of loss. The value, being fixed definitely by agreement, cannot be questioned, except in cases of fraudulent over-valuation.

58e. Duration of risk.—The duration of risk is the period of time for which the risk is to run. "Time is of the essence of the insurance contract," and it is a requisite that it should be distinctly stated in the policy. To meet this necessity all policies have some definite hour of the day specified as the commencement, and the same hour of the day of expiration, as the termination of liability.

The custom of regular "quarter-days" for the duration of fire policies and the payment of premiums still continues in Great Britain.

¹ *Infra*, § 61c, and 14 Geo. III., c. 48. ² *Infra*, § 61a. ³ *Ib.*

The risk ends with the term for which it was made. Judge Mackay¹ discusses the point whether, if a fire commence in insured buildings before the expiration of the term of insurance, and continue till after expiry of it, the insurers are liable, and to what extent. He holds the liability limited to the extent of the damage done during the subsistence of the policy.

59. Description and conditions component parts of policy.—

The description of the subject matter, except in a general way, is not always, and the conditions are not usually, incorporated into the body of the policy proper.

The former is contained in a separate paper termed the “application” or “declaration” (in England termed “proposal”), while the latter are endorsed on the back of the policy.

They are both made component parts of the policy by reference.

Statements of an insurance agent prior to the execution of the policy are not admissible as against the company to vary the terms of the written contract.

Parol evidence may be adduced to explain, but not to contradict a written document, and in a commercial contract, mercantile custom will be the dictionary wherefrom to draw explanations.²

60. Policy obtained by fraud.—A policy obtained by fraud or by a breach of the high degree of good faith required as between insurer and assured, being only voidable, the party defrauded, whether insurer or assured, must take steps to avoid the contract or he will be held by his quiescence to have assented to the contract and selected to treat it as valid.³

If the insurer discovers that he has been induced by fraud to grant the policy, and after such discovery accepts premiums and treats the policy as good, it would seem that he would thereafter be estopped from denying its validity, more especially if he allows the policy to be assigned to a *bona fide* holder for value.⁴

There are three courses open to the insurer on discovering that he has been induced to grant the policy through fraud of the assured :

¹ Mackay on Fire Ins., 13 L.N., 174.

² Bowers v. Shand, 2 App. Cass. 468, Lord Cairns, C.C.L.C. 1234 ; Sullivan v. Cotton States L. Ins. Co., 43 Ga. 423, at 427.

³ British Equitable v. G.W.R., 38 L.J. (Ch), 132, 314 ; London Ass. v. Mansell, 11 Ch. D., 363.

⁴ Per Inglis L.P. in Scottish Equitable v. Binot, 4 C.S.C. (4th series), 1076 to 1082.

1. To refuse to receive further premiums and repudiate the contract after discovering the fraud.

2. To seek cancellation of the policy offering at the same time to return all premiums paid.¹

3. If the policy has matured, by defending any action for recovery of the insurance money.²

61. Valued policy.—In a valued policy the sum agreed on is conclusive,³ unless it exceeds reasonable limits.⁴

Under the American authorities the overvaluation must be “grossly enormous” to admit of dispute.⁵

61a. Valued or open policies.—The policy either declares the value of the thing insured, and is then a valued policy, or it contains no declaration of value, and is then an open policy.⁶

61b. Fraud not presumed unless overvaluation be excessive.—There is not, in Quebec, a presumption of fraud against one who insures a thing for more than its real value. The presumption is rather that he has done so with no bad faith. If fraud be alleged it must be proved. Men, it is said, differ as to values, and insurers may gain by overvaluations. But if the insured overvalue and persist in a valuation greater than his loss, particularly under an open policy, the appearances of good faith diminish. But a slight excess ought not to be regarded. In the old marine insurance cases, Emerigon was for holding that the excess should be of a fourth at least, to be regarded.

Phillips, § 1183, holds that the fact of property being valued too highly is not, under the English law, of itself, a badge of fraud ; but Marshall, after Lord Mansfield, says, if much overvalued it

¹ Prince of Wales Ass. Co. v. Palmer, 25 Beav. 605 ; London Ass. v. Mansell, 11 Ch. D., 363, 372 ; British Equitable v. G.W.R., 38 L.J.Ch., 132, 314.

² London & Provincial Marine v. Seymour, 17 Eq. 85 ; Seymour v. London & Provincial, 42 L. J. C. P. 111, note. ³ Arnould on Ins., 1, 304 ; May, 48.

⁴ Rogron, Code de Com., 386, n. ; Pardessus, Droit Com., 593-6-7 ; Alauzet, Ass., 221 *et seq.* ; 3 Kent's Comm., 273, n. (d), and cases cited ; Boulay Paty is incorrectly cited, see Droit Com., tit. 10, par. 20, and see *infra* ; Barker v. Janson, 16 W. R. 399, L. R. 3 C. P. 303, 37 L. J. C. P. 105 ; Ionides v. Pender, L. R. 9 Q. B. 531, 43 L. J. Q. B. 227, 30 L. T. N. S. 547, 22 W. R. 884. ⁵ May on Ins., 48.

⁶ Porter's Laws of Ins., 3, 4, 7 and 45 ; 1 May, 51, § 33 ; C. C. L. C. 2480 ; Poth. Ass., 99 *et seq.* ; Emerigon, c. 1, s. 1 ; 1 Phillips, 45, 305, 320, c. 14, ss. 1 & 2, pp. 2, 3, note b Imperial statute 19 Geo. II., cap. 37 ; 2 Pardessus, nn. 502, 503, 504, p. 481, n. 593, *et seq.*, cap. 3 ; 1 Arnould, 12, 13, nn. 14, 16 ; C. Com., 332, 339 ; and see *supra* § 58 & § 58d.

must be with a bad view. Kent says that if the valuation be grossly enormous, it gives rise to a strong presumption of fraud.¹

61c. Wager or gaming policies.—Wager or gaming policies, in the object of which the insured has no insurable interest, are illegal.² They are mere bets, and are prohibited in England, Canada and the United States. In the United States, however, policies have been held valid which by their terms relieved the insured from the necessity of proving his interest in case of loss; while in England such a clause is conclusive that the contract is a wager. In the United States it is only *prima facie* evidence of a wager, and may be explained.

61d. Speculative policies on the lives of royal personages, etc.—There are said to be a number of speculative policies in existence, taken out in England in certain companies by private individuals on the lives of royal personages. These would seem to be clearly wager policies and consequently illegal.

Speculative insurance contracts of various kinds are said to be effected at Lloyds', London.

At the present time there is reported to be a great demand for Jubilee insurance, and it has been announced that a large number of contracts are being effected on the life of the Queen at the rate of five guineas per cent. for three months. Much business is also being done in insuring the lives of the royal family, and in guaranteeing the route of the royal procession.

The lives of Cabinet Ministers and other eminent public persons also form subjects of speculative insurance, although not necessarily of an illegal character, as such insurances are effected by servants or others to whom the death of the person in question might mean a serious pecuniary loss.

The idea of insurance has even been extended so far as to protect a theatrical manager against empty houses, and to cover the success of a newspaper and its continuation for a certain length of time.

In short, there seems to be nothing in the shape of a risk which is not liable to be insured against.

A most unique insurance, in some respects similar to insurance against the birth of issue as reported *supra*,³ is said to have

¹ Mackay on Fire Ins., 13 L. N., 248; see also index for § *infra*.

² *Ib.*, *supra* 58b. ³ §25g.

been effected at Lloyds' some time ago by a lady, who insured herself for a premium of £3 10s. for the time of two years against the birth of twins. She gave birth to twins within the specified time and received the sum contracted for.

Insurance against want of employment has recently been tried as a social experiment on the continent of Europe, but was abandoned as the results have not been satisfactory.

61e. Valued policies in British Columbia.—An attempt has quite recently been made to introduce the practice of valued policies in British Columbia, but upon discussion the legislature of that province rejected the bill on the ground that instead of being a benefit to the public it would inflict a hardship and result in raising the rates of premium. The insurance companies would be put to the additional expense of having to appoint a special valuator for each line of business, and it would also tend to increase incendiarism by offering greater temptation to dishonest people.¹

62. Delivery of policy consummation of agreement.—The agreement to insure exists prior to the drawing and delivery of the policy and it contemplates the delivery of the policy as the consummation of the agreement. Thus where plaintiff's agent applied for insurance and agreed upon all the terms, but left the office before the policy was filled out, and a loss occurred before the policy was filled out, the Court held the company liable.² But this ruling would hardly seem sustainable in a case where the policy made the payment of the premium a condition precedent to the validity of the contract, as is now the almost universal practice.

63. Action for premium, incompleted contract—Stipulation that contract was not complete until premium was paid.—The defendant at the request of the local agent of the plaintiff company applied for a policy of insurance on his life and submitted to the usual medical examination, at the same time telling the agent that he was not then prepared to pay the premium. The company accepted the application and sent the policy to the agent. It contained an express notice that until payment of the premium it would be considered void ; and by the rules of the company the

¹ Ins. and Fin. Chronicle, Vol. XVII., p. 178.

² Kohne v. Ins. Co. North America, 1 Wash., U.S.C.C., 93.

agent had no authority to waive this condition. The agent called upon defendant with the policy when he said he was still unable to pay the premium, but told him to let it lie, and he would attend to it in a little while. Three or four weeks after this, and without further communication with the defendant the agent forwarded the policy to him by mail. The defendant took no notice of it and the plaintiffs brought this action to recover the premium as due upon a completed contract of insurance and the policy duly issued. The jury found that the defendant signed the application not intending it to be used as an application and on the representation by the agent that it would not be used without his consent. The judge of the county court set aside the finding as being against evidence and directed a new trial: Held, per Hagarty, C.J.O., that there being ample evidence to sustain the finding of the jury and none to show that the defendant had finally assented to or perfected the proposed insurance a new trial should not have been granted. Per Burton & Patterson, J.J.A., the action failed because it was brought upon an executed contract and there was no completed contract, in fact, as it appeared by the plaintiff's own declaration on the face of the policy that it was not to be operative until payment of the premium; and no waiver of that condition prior to or contemporaneously with the delivery to the defendant, was proved.¹

64. Premium not paid and policy not delivered, contract incomplete.—If premium has not been paid and there is no delivery of the policy the contract is *prima facie* incomplete, and he who claims under it must show that it was the intent of the parties that it should be operative notwithstanding these facts. The presumption of law is that the delivery of the policy and the payment of the premium are dependent upon each other.²

65. What constitutes delivery.—To constitute a delivery of a policy it is not necessary that there should be an actual manual transfer from one party to the other. The agreement upon all the terms and the issue and transmission of the policy to the agent for delivery, without condition is equivalent to a delivery to the insured.³

66. Policy not delivered.—Premium not paid.—No notice of death.—This was an action on a policy of insurance bearing date

¹ Sun Life Ass. Co. v. Page, 15 A.R., 704.

² Heiman v. Phoenix Mut. L. Ins. Co, 17 Minn., 153 at 159.

³ May, 60, and see Fried v. Royal Ins. Co., there cited.

at Hartford, Conn. It was a policy on the life of M. in favor of E. M. and purported to be in consideration of a sum of \$73.76 in gold duly paid, and the conditions were that the policy was to become due three months after notice to the company of the death of M. A claim being made under the policy, the defendants resisted payment on the ground that E. M. never paid them any money at all ; that it was the insured, her brother, who sent to the office of the company and succeeded in getting the insurance on giving a note for the premium, and the note went to protest and was tendered back to him. The policy could not be delivered, according to the rules of the company, without the premium being paid. Held, that the plaintiff, however, had proved enough to show apparently a right of action. But there was a fatal defect in the case. There was no notice and proof of the death of the insured as required by the conditions of the policy, nothing to show that the time for payment had arrived. So that while the defendants failed upon their other pleas they must succeed upon the general issue. The plaintiff might sue the company again, and succeed upon making the proper proof. Action was dismissed reserving plaintiff's recourse.¹

67. Delivery of policy not proved.—In another case plaintiff having failed to prove that the policy of insurance had been delivered to defendant, the premium note, on which the action was founded, the interim receipt and the application of the defendant made for the purpose of said insurance, were held null and without effect.²

67a. Non-delivery of policy a waiver of conditions.—The non-delivery of a policy to the insured for short term insurance has been held a waiver on the part of the company of the conditions contained therein.³

68. Delivery of policy not countersigned—Escrow.—On an action on a policy the appellant claimed that the policy was never delivered, and that the premium had never been paid, and that it was not a perfected contract between the parties. The policy was sent from Toronto to the agent at Halifax, to receive the premium

¹ Maybury v. Phoenix Life Ins. Co., S. C., Montreal, 1878. Referred to in Stephen's Digest, II., 402.

² Giles v. Jacques, 29 L. C. J., 138, 1885 ; M. L. R., 1 S. C., 166, & 8 L. N., 100.

³ Q. B., Lafleur & Citizens Ins. Co. 1 L. N., 518, 22 L. C. J. 247 and see *infra*.

and countersign the policy and deliver it to the party entitled. The agent never countersigned the policy, and on one side of the policy the following memo. was printed: "This policy is not valid unless countersigned by agent at Countersigned this day of, agent." The agent, in his evidence, said he delivered the policy to W. O'D. (the party assuring) not countersigned, in order that he might read the conditions, and swore the premium had not been paid. The policy was found among W. O'D.'s papers after his death not countersigned. The policy was dated 1st October, 1872, and the first premium would have covered the year up to the 1st October, 1873. W. O'D. died on the 10th July, 1873. The case was tried before McDonald, J., without a jury, and he gave judgment in favor of respondent for \$3000, the amount of the policy, and this judgment was confirmed by the Supreme Court of Nova Scotia.

On appeal to the Supreme Court of Canada it was held, per Ritchie, C. J., and Strong and Taschereau, J. J. (Fournier and Henry, J. J., dissenting), that the evidence established the fact that the policy had not been delivered to the assured as a completed instrument, and therefore the company was not liable.

Per Gwynne, J. That the instrument was delivered as an escrow to the agent, not to be delivered as a binding policy to W. D. until the premium should be paid, and until the agent should in testimony thereof countersign the policy, and that there was no sufficient evidence to divest the instrument of its original character of an escrow, and to hold the defendants bound by the instrument as one completely executed and delivered as their deed. The appeal was allowed and a new trial ordered.¹

In the same action the case having gone to trial for the third time: on the trial the learned judge admitted in evidence an entry in the books of his father made by the deceased holder of the policy showing a payment to the agent of the company of an amount equal to the premium, which the evidence showed was paid by money given to deceased by his father. He also admitted the evidence of the agent, who had since died, taken at a former trial of the case, to the effect that the premium was not paid, and that the policy was only given to the deceased to enable him to examine

¹ Supreme Court of Canada, *Confederation Life Association v. Canada v. O'Donnell*, 10 S. C. R. 92.

it, and not as a duly executed policy. The jury found a verdict for the plaintiff, but stated, in answer to a question submitted by the court, that the agent had been instructed not to deliver the policy until it was countersigned. The Supreme Court of Nova Scotia affirmed the verdict. On appeal to the Supreme Court of Canada : Held, per Ritchie, C.J., and Gwynne, J., that the policy was only delivered to the agent as an escrow and as it was never duly executed and delivered the company was not liable. Per Strong, J. : That the memorandum as to countersigning was not a condition of the policy and the plaintiff was not barred by non-compliance with its terms ; but the evidence of the entry in the books of the deceased was improperly admitted and there should be a new trial. Per Fournier and Henry, JJ. : That the policy was properly executed and delivered and as there was sufficient evidence to sustain the verdict independent of the evidence alleged to have been improperly admitted at the trial, the appeal should be dismissed. Per Henry J. : Under the present practice the court is bound to uphold a verdict if there is sufficient legal evidence to establish it independently of evidence improperly received, and cannot take into consideration the effect on the jury of such illegal evidence. Strong, J., contra.

The court being thus divided in opinion a new trial was granted.¹

In the same action the case having again gone down for trial, evidence was given of the payment of the premium and rebutting evidence by the company that it had never been paid. The jury found that the premium was paid and the policy delivered to the insured as a completed instrument, and a verdict was entered for the plaintiff and affirmed by the Supreme Court of Nova Scotia.

Held, affirming the judgment of the court below, Sir W. J. Ritchie, C.J., and Gwynne, J., dissenting, that the necessity of countersigning by the agent was not a condition precedent to the validity of the policy, and the jury having found that the premium was paid their verdict should stand.

The judgment on the former appeals in this case was, on this point, substantially adhered to.²

69. Delivery of policy.—In this case it appeared that an application had been received by the company, and the party

¹ *Confeder. Life Ass. of Canada v. O'Donnell*, 13 S.C.R., 218.

² *Idem*, 16 S.C.R., 717.

making the application had possession of a policy of insurance in the company to which application had been made, and for which a note for the premium had been executed to the company. It was held by the Kansas Supreme Court that this was evidence sufficient to go to the jury, and that the court could not say that there was a failure of proof showing that the insurer had executed and delivered a policy to the insured.¹

70. The premium.—In the old policies the words “I am content with this assurance,” were inserted as an acknowledgment that the insurer was satisfied with and would not later dispute the sufficiency of the premium. The adequacy of the premium however is now purely the insurer’s concern.

If a policy containing a condition that it shall not be binding until the premium is paid and also an acknowledgment of the receipt of the premium is delivered to the assured before payment of the premium] this raises a presumption of waiver of such condition and of an intent to give credit for the premium, the condition notwithstanding.²

When the policy admits payment parol evidence that payment has not actually been made is inadmissible.³

70a. Griswold’s Definition of Premium.—Premium is the consideration for the insurance. It must be set forth in the policy, both amount and the rate per cent., which must be fixed before the policy will attach.

If the policy be delivered without demand for payment of the premium at the time, it raises the presumption that credit is intended. An agreement to give credit for premiums renders the policy valid and binding as against the company.

An agreement by an agent to be responsible to his company for the premium is a payment of the premium as between the company and the insured. Where an agent gives credit for the premium and makes a return of the policy in his account with his company such premium is paid ; but the agent has a lien upon the policy for that amount, only so long, however, as he retains the

¹ German Fire Ins. Co. v. Laggart (1892) 47, Kan. 663.

² Masse v. Hochelaga Co., 22 L.C.J., 124, 3 Kents Com., 260, Anderson v. Thornton 8 Ex. Rep. 425.

³ Anderson v. Thornton, 8 Ex. R. 425, Dalsell v. Mair, 1 Camp, 532, DeGaminde v. Pigon, 4 Taunt, 246.

policy in his own hands : if given up to the insured his lien goes with it and, in the event of loss, he cannot stand in the place of the company and claim payment out of the sum due to the insured under the policy.¹

71. Prepayment of premium.—Prepayment of the premium is not in law a condition precedent to the making of a complete contract of insurance ; but it is the almost universal practice of insurance companies (other than marine) to stipulate that the contract shall not begin to take effect until the premium has been paid. This stipulation is enforced by the courts, and they refuse to give effect to a contract where a loss has happened after an agreement to issue and accept a policy, but before the premium has been paid and the policy issued, or even when it has been delivered as an escrow.²

72. Giving credit for premiums.—Bunyon³ says that insurance offices may agree to give credit to the insured for premiums and hand him receipt, and where such credit is given it is equivalent to payment. This must, however, says Judge Mackay,⁴ be taken to be subject to the proviso that the Act of incorporation does not prohibit such a proceeding. In the absence of fraud, the policy statement is conclusive as to premium paid.⁵ In one case the insurance company took the insured's note for the premium, payment whereof was acknowledged, and policy delivered. The insured failed to pay the note at maturity. Held, that the insurance not the less attached. The policy was held to admit a *paiement effectif* to the satisfaction of the insurers. Judgment went in favor of the insured, less the amount of the note, and this was confirmed by the Queen's Bench at Montreal, the five judges being unanimous.⁶

73. Law in Quebec and in Ontario as to loss within term of grace—Payment of Premium—Credit—Authority of Manager.—In Quebec there is no doubt that where a month's grace is given for payment of renewal premium, the death of the insured within the month and before payment of the premium will not pre-

¹ Griswold, 485.

² Porter's Laws of Insurance, 73 ; Confederation Life Association of Canada v. O'Donnell, 10 S. C. R. 92, 13 S. C. R. 218, 16 S. C. R. 717, cited *supra* § 68, May, 43.

³ p. 83. ⁴ 13 L. N., 175. ⁵ Smith's Merc. Law, 357.

⁶ Cultivators' Ass. Co. & Grammon, 3 L. N. 19.

vent a valid tender of it being made by his representatives within the month.¹ In Ontario, however, the judges of the Court of Appeal are divided upon this question, and it must remain doubtful until either the Supreme Court of Canada has pronounced upon it or further legislation has made it clear.² Of course where the stipulation on the policy clearly gives the right to the representative no difficulty can arise, and such a stipulation will be enforced. The reasoning of Burton and MacLennan, J.J., seems convincing.³

By an application for life insurance, the interim receipt and the policy, it was provided that no policy was to be in force until actual payment of the first premium to an authorized agent and the delivery of the necessary receipt signed by the general manager of the company. The general manager, who was paid by commission, made an agreement with an applicant for a policy that work done by the applicant for himself personally would be taken in payment of the first premium, and gave him a receipt for it without, however, paying the company.

Held, that the company was not bound.⁴

74. Acceptance of note as cash for premium.—When premium is paid by note, the failure of the insured to pay the note at maturity does not annul the policy where the note had been accepted as cash and the receipt acknowledged by the policy.⁵ It would, of course, be otherwise if so stipulated in the note.

75. Set off in compensation—Damages for fire, against premium due.—An insured cannot set off against his premium due damages he pretends to have suffered by a fire, as his claim for damages is not clear and liquidated.⁶

76. Premium notes by agent of a railway company—Policy in his name—Marine insurance.—The agent of a railway company gave his own individual notes to an insurance company for a premium of marine insurance and took the policy of insurance in his own name, and afterwards gave the notes of the firm to which he belonged, for the same debt. Held, that the railway company was liable in a direct action to the amount of the premiums, and

¹ C. C. L. C., 2583, 2585.

² Manufacturers' Life Ins. Co. v. Gordon, 20 A. R. 309. ³ *Idem*.

⁴ Tiernan v. People's Life Ins. Co., 26 O. R. 596.

⁵ Cultivators Ins. Co. & Grammon, Q.B., 3 L.N., 19.

⁶ Giles v. Giroux, 13 R.L., 652.

that on an intervention by the firm, the renewal notes fyled in the case would be declared inoperative as against the intervening parties and be ordered to be delivered up to them.¹

77. Life insurance—Premium note—Non-payment of—Forfeiture.—A very important decision recently rendered by the Ontario courts and finally by the Supreme Court of Canada is that of *McGeachie v. North American Life Ass. Co.* The facts may be summarised as follows: The defendants insured the life of the plaintiff's husband and issued a policy to him, taking his promissory note for the amount of the first year's premium. The note was several times renewed, and at the death of the insured, which took place within the first year, the last of the renewals was overdue and unpaid. During the currency of one of the renewal notes the insured wrote to the defendants asking them for their terms for the cancellation of the policy, to which they replied that his request that they should cancel the policy was unreasonable. On the day before the death of the insured the defendants wrote to him that they had expected to hear from him with a remittance, and asked him to give the matter his immediate attention. After his death the amount of the note and interest was tendered to the defendants who refused to accept it. In the application for the insurance, which was made part of the contract, it was provided that if a note should be given for a premium and should not be paid at maturity, the insurance or policy should thereupon become null and void, but the note must nevertheless be paid; and endorsed on the policy was a provision that, if any premium note should not be paid when due, the policy should be void and all payments made upon it forfeited to the defendants:—

It was first held in Q. B. D. that the policy was voidable upon default being made in the payment of the premium note, but only at the election of the defendants, that, upon the evidence, the defendants had elected not to forfeit it but to continue it, and had treated it as subsisting up to the time of the death, that the policy being in force at the time of the death no subsequent act of the defendants could affect the plaintiff's claim:—

Held, also, in Q. B. D. upon the evidence, that it could not be said that the defendants were at any time electing to forfeit the

¹ *Montreal Fire Ins. Co. & The Stanstead Shefford & Chambly Railway Co. & Wood et al.* 13 L. C. R., 233, S. C., 1863.

policy and nevertheless insisting upon the payment of the note, as they might have done under the provision therefor in the application.¹

But the Court of Appeal reversed this decision and held that the insurers were not bound on non-payment of the note to do any act to determine the risk. In the absence of an election to continue the risk it comes to an end and mere demand for payment of the note and a refusal during the currency of the note to accede to the insured's request for cancellation of the policy are not sufficient evidence of such election.²

And the Supreme Court of Canada affirmed this decision.³

Owing to the importance of this case it is well to consider its details at some length. The plaintiff by her statement alleged :—

(1.) That she was a widow and resided at St. Catharines, and the defendants were an insurance corporation and had their head office at the city of Toronto in the County of York. (2.) That the defendants on or about the 6th day of December, A.D. 1889, through their agent at the said city of St. Catharines issued their policy 7710, upon the plan known as the Semi-Tontine Dividend plan upon the life of one Robert McGeachie the husband of the above named plaintiff, whereby the said defendants, amongst other things, promised to pay to the said plaintiff in case of the death of the said Robert McGeachie within the Tontine period 1909 the sum of one thousand dollars. (3.) That the said Robert McGeachie departed this life on or about the 6th day of November last (1890) and during the continuance of the said policy. (4.) That the said defendants had received proper proof of the death of the said Robert McGeachie in accordance with the terms and conditions of said policy. (5.) That all conditions had been fulfilled, all things had happened and all times had elapsed necessary to entitle the said plaintiff to be paid the same sum of one thousand dollars, but the said defendants had refused to pay the same.

The defendants by their statement of defence alleged : (1.) That the policy referred to in the second paragraph of the statement of claim and the covenants therein made on the part of the defendants were on the face of the said policy expressed to be in consideration of the payment of the annual premium of \$31.10 to be paid in advance to the company at its head office in the city of

¹ *McGeachie v. North America Life Ass. Co.*, 22 O. R., 151.

² *Idem*, 20 A. R., 187. ³ *Idem*, 23 S. C. R., 148.

Toronto. (2) That the premium of \$31.10 in the said policy referred to had never been paid. (3.) That in the application for the said policy, which application was signed by the said Robert McGeachie, it was provided that if a note, cheque, draft or other obligation should be given for the first or a subsequent premium or any part thereof, and if the same should not be paid at maturity, it was agreed that any insurance or policy made on that application should thereupon become null and void, but the note, cheque, draft or other obligation must nevertheless be paid. (4.) That the said application was by the terms of the said policy made a part of the said policy. (5.) That the said policy contained a provision that the same was issued and accepted upon certain special provisions therein printed and written and also upon the conditions on the back thereof. (6.) That the said conditions endorsed upon the back of the said policy contained among others the following : " If any premium note, cheque or other obligation given on account of a premium be not paid when due, the policy shall be void and all payments made upon it shall be forfeited to the company." (7.) That the said Robert McGeachie being unable to pay the premium upon the said policy, the company agreed to accept a promissory note for the amount of the same. (8.) That the said promissory note was not paid at the maturity thereof and had never yet been paid. That the said note was renewed but the renewal thereof had not been paid and remained in the hands of the defendants overdue and unpaid.

The plaintiff joined issue upon the said statement of defence and for a reply thereto said. (2.) That the one month of grace allowed for the payment of premiums upon said policy had not expired at the death of the said Robert McGeachie and that before the expiration thereof the said plaintiff offered to pay the said note but the defendants refused and still refused to accept the same. And further said, (3.) That if the said company had any right to cancel the said policy when said renewal note became due before the expiration of said one month, which the plaintiff did not admit but denied, that the said company expressly waived their rights under said policy and only sought to exercise such rights, if any, when they learned of the death of said Robert McGeachie and with the object of preventing the plaintiff if possible from recovering upon the said policy. And the plaintiff said that in any event the conditions upon said policy and to which the defendants referred

in their statement of defence were unreasonable and unjust and should not be enforced against the plaintiff.

The cause was tried by Street J. at St. Catharines, Ontario.

The application for the policy sued on, signed by Robert McGeachie was put in evidence, which contained the following provisions :—"It is hereby declared and agreed that all hereinbefore contained with the accompanying reports and agreement and this declaration and agreement constitute an application to the North American Life Assurance Company for the insurance proposed ; that a policy, if issued in the company's usual form and delivered, shall be the only acceptance of this application ; that any person having or claiming any interest under such policy adopts as his or her own each and all of the statements in said application, all of which statements hereby declared to be material to the contract, whether written by his or her own hand or not, and declares the same to be full, complete and true as facts and such statements are the only statements upon which the policy, if issued will be founded ; that such policy will be accepted when presented subject to the terms in and upon the said policy set forth.

" That the entire contract shall consist only of said application and policy and shall be construed and interpreted as a whole and in each of its parts and obligations according only to the terms thereof ; that no part of the application or policy will be varied by any usage or custom whatever ; that the place of contract for all purposes shall be the head office of the company in Toronto, and all rights, claims and remedies not based on such contract are hereby waived.

" That no agent of the company (whether called general or otherwise) has power to bind the company in any way ; nor is any agent authorized to receive any payment due to the company except when provided with a receipt therefor signed by the President or Managing Director in accordance with the terms of such receipt, every such payment being then not overdue.

" That no information or statement not contained in said application, no notice of any facts touching said application or said policy however made, given, received or acquired shall affect the company unless forthwith communicated in writing by the insured to its President or Managing Director at his head office and assented to by him in writing for the company ; that no agent of the company or any other person except the President or Vice-

President or the Managing Director under the direction of the Board of Directors has power to make, alter, revive or renew any contract of insurance, grant permits or waive forfeiture or any condition of such policy.

“ It is hereby further agreed that should the company upon any occasion consent to renew or revive a policy after the same has become null and void every such renewal or revival shall always be understood as in no wise creating any precedent for waiving or as a waiver of any condition or agreement in the policy or application.

“ That under no circumstances shall the policy be held to be in force until the actual payment to and acceptance of the first premium due thereon by an authorized agent of the company and the delivery to the insured of the necessary receipt signed by the Managing Director, the life of the person proposed for insurance being at the time of such payment in the same condition of health as stated in this application, and that if any fraudulent or materially incorrect averment has been made or any material information has been withheld by the insured all sums which shall have been paid to the company upon account of the insurance made in consequence hereof shall be forfeited and the insurance be absolutely null and void ; that no presumption of death shall arise from disappearance.

“ That if a note, cheque, draft or other obligation be given for the first or a subsequent premium or any part thereof if the same be not paid at maturity, it is agreed that any insurance or policy made on this application shall thereupon become null and void, but the note, cheque, draft or other obligation must nevertheless be paid.

“ That I have read or heard read and understood the said application and this agreement part thereof, and assent to all therein contained, and I agree to accept the policy when issued on the terms mentioned herein and pay the company the premium thereon in consideration of their acceptance of this application.”

The following receipt was put in : “ North American Life Assurance Company ; Head office, Toronto, Ontario ; first premium \$31.10 ; sum insured \$1,000. Received this sixth day of December, 1889, note for thirty-one $\frac{1}{100}$ dollars for the first premium on policy number 7710 on the life of R. McGeachie, Esquire, subject to all the provisions of the said policy and those on the back thereof hereby incorporated herein. Wm. McCABE, Managing Director.”

"The policy is not valid or operative unless this receipt is countersigned by the agent of the company on the actual date of payment within thirty days of the issue of the policy, the life insured being then as stated in the application for the policy.

"WM. H. HEWSON, Agent at St. Catharines.

"Especial attention is called to the back of this receipt."

And on the back of this receipt was endorsed the following :
 "Provisions for payment of premiums ; all premiums are due at the head office of the company in the city of Toronto, Province of Ontario at the date named in the policy, but at the pleasure of the company suitable persons may be authorized to receive at other places such payments, but only on the production of the company's receipt therefor signed by the President or Managing Director. No payment of a premium however made except in exchange for such receipt will be recognized by the company or be deemed by either party as valid payment. The revival of a policy must be understood not to constitute in any case whatever any obligation on the part of the company to waive the payment of a future premium when due."

"Commencement of insurance year and balance of year's premium. All premiums are payable annually in advance ; when the premium is made payable in semi-annual or quarterly instalments, that part of the year's premium, if any, which remains unpaid at the maturity of this contract shall be regarded as an indebtedness to the company on account of the policy and shall be deducted from the amount of the claim, and if any premium or obligation for a premium be not paid on or before the day it is due, the company shall from that day be released from all liability under the policy except as modified by the non-forfeiting terms thereof, if the policy is then entitled to the benefits thereof, and no credit for surplus accumulated upon the policy shall be deemed applicable to the payment of any premium unless the previous consent of the company be obtained in writing."

"N. B.—Agents are not authorized to make any change whatever in receipts for premium or to waive forfeiture or any condition of a policy or premium receipt ; that can be done only by writing signed by the President or Managing Director under the direction of the Directors."

The policy under the seal of the defendants was put in, which provided that the defendant company, in consideration of the

application for this policy and of the statements and agreements therein contained hereby made a part of this contract and of the annual premium of thirty-one dollars and ten cents to be paid in advance to the company at its head office, in the city of Toronto on the delivery of this policy and thereafter on the fifth day of December in every year during the term of nineteen years, insures the life of Robert McGeachie, of St. Catharines, in the county of Lincoln and Province of Ontario, and promises to pay to his wife, Emma Jane McGeachie, should his death occur within the tontine period hereof, otherwise to himself, his executors, administrators, or assigns the sum of one thousand dollars, first deducting therefrom the balance of the current year's premium, if any, and all loans on account of this policy, upon satisfactory proof at its head office of the death of the insured during the continuance of this policy and its surrender with the last renewal receipt thereof." And that "this policy is issued and accepted under the Company's semi-tontine dividend plan upon the following special provisions printed and written and also on the back hereof, all of which are hereby incorporated herein and made part hereof."

"Provision G.—A grace of one month will be allowed in payment of premiums on policies in this class, at the expiration of which time if said premiums remain unpaid, this policy shall thereupon become void. But a re-instatement will be permitted if application therefor be made in writing to the company at its head office within two months after the expiration of the month of grace, accompanied with a certificate of good health from a medical examiner of this company on the company's form number 24, subject to its approval ; provided always that whenever advantage is taken of this grace or of the privilege of re-instatement, interest shall be paid to the company at the rate of seven per cent per annum for the time deferred." And that no provisions of this contract can be changed, waived or modified, or permit granted, except by a written agreement signed by the President or Vice-President or the Managing Director of the company."

And on the back of said policy there was endorsed the following : "This policy is issued and also accepted by the insured and assured upon the following additional provisions and agreements therein made a part thereof." Among which provisions so endorsed were the following : "If any premium note, cheque, or other obligation given on account of a premium be not paid when

due, this policy shall be void and all payments made upon it shall be forfeited to the company." "That under no circumstances shall this policy be held to be in force until the actual payment to and acceptance of the first premium due thereon by an authorized agent of the company, and the delivery to the insured of the necessary receipt signed by the Managing Director, the life of the person proposed for insurance being at the time of such payment and delivery in the same condition of health as stated in the application for this policy." "Should the company upon any occasion consent to renew or revive a policy after the same has become null and void, every such renewal or revival shall always be understood as in no wise creating any precedent for waiving and not as a waiver of any condition or agreement in the policy or application."

The note mentioned in the said receipt was not produced but it appeared to have been dated December 4th, 1889, at six months, and to have borne interest at the rate of seven per cent, per annum.

On the 27th of May, 1890, the defendants by their Managing Director, wrote to Robert McGeachie as follows: "We beg to remind you that your note, amount \$31.10, and interest, \$1.10, becomes due here at the head office on the 7th day of June, 1890. Your prompt attention will oblige."

This note was not paid when due, and a new note was taken for \$32.20 covering the amount of it and interest dated the 7th day of June, 1890, payable in thirty days with interest at seven per cent per annum. A similar notice to that given by the defendants to McGeachie on the 27th May, 1890, was given by them to him in respect of the last mentioned note. On July 2nd, 1890, McGeachie wrote to the defendants as follows: "That note of mine held by you \$32.20 I am unable to pay. I am sorry that I undertook it under my present circumstances. About a year ago I had to make an assignment and settled by giving notes and I find it all I can do to get along—the note will be due on July 10th, that will be seven months' insurance, or suppose it was changed from endowment to ordinary life without profits, how much would it be for me to pay? Please answer soon and oblige."

On the 4th July, 1890, the defendants, by their Managing Director, replied as follows: "*re* policy 7710—We have yours of the 2nd instant. Evidently you knew just as well when you accepted the note whether you would be able to meet the same at

maturity as you do now, and therefore your request that we cancel the policy is unreasonable. Had you died during the currency of the note, your wife would certainly have expected this company to pay the full amount of the policy and very properly so too. We therefore shall expect you to pay your note. If you remit us one-half the amount we shall have no objection to extend the time for the balance for two months, and will send you a note for your signature for the same. No change in the present policy could be considered by our committee until the note has been paid."

The secondly above mentioned note was paid when it fell due, and a new note was taken, dated 10th July, 1890, at two months for \$22.40 with interest at the rate of seven per cent per annum, McGeachie having paid \$10 on account on each. A similar notice to that given by the defendants to McGeachie on the 27th May, 1890, was given by them to him on the 2nd September, 1890, in respect of the last mentioned note. The last mentioned note was not paid when it fell due, and the defendants took from McGeachie a new note dated 13th September, 1890, at one month for \$22.80. On the 15th September, 1890, the defendants, by their Managing Director, wrote to McGeachie as follows: "We have your favour enclosing renewal note in place of that due on the 13th instant. We now return to you herewith your old note duly cancelled, and note that you will remit for the one which we received to-day before its maturity." A similar notice to that given by the defendants to McGeachie on the 27th May, 1890, was given by the defendants to McGeachie on the 3rd October, 1890. The last mentioned note was not paid when it fell due, and on the 5th day of November, 1890, the defendants, by their Managing Director, wrote to McGeachie as follows: "7710; we fully expected to have heard from you ere this with a remittance for your note which matured on the 16th ult. Kindly give the matter your immediate attention." This letter was mailed at Toronto on the 5th November, 1890, on the morning of which latter day McGeachie died. The amount of the note and interest was tendered to the defendants and they refused to accept it. Proofs of death were duly given on the 30th December, 1890.

The learned judge Mr. Justice Street gave judgment as reported above, in favor of the company.

On the 17th November, 1891, Aylesworth, Q.C., moved to set aside the said judgment and to enter judgment for the plaintiff for

the full amount claimed, with interest and costs, or for a new trial or for such other order as might seem meet, on the following grounds: (1) That the said judgment was against the evidence and the weight of evidence. (2) That the said judgment was bad in law. (3) That the learned judge should have found that the said company, by accepting the premium note, and renewing the same from time to time, were estopped from setting up the defence that the said policy was avoided by non-payment of the last renewal note. (4) That the learned judge should have found that provision G of the said policy, which provided that a grace of one month would be allowed on payment of premium, was applicable to the note given for said premium and the renewals thereof, and that the amount of the last renewal note having been tendered to the said company within thirty days from its due date, the said company had no right to cancel or avoid said policy for non-payment of said note, and the plaintiff was therefore entitled to recover upon said policy. (5) That the learned judge, in any event, should have found as a fact that the company, by requesting payment of the last note, in their letter of the 5th November, consented to waive any rights, if any they had, as to avoiding and cancelling the said policy for non-payment of said note. (6) That the learned judge should have found upon the evidence that the company were willing to accept the money in accordance with the terms of the letter of the 5th November, and that if the same had been paid no cancellation or avoidance of the policy would have been claimed or urged by the defendants. (7) That the evidence of the manager of the company showed that no steps were taken by the said company to forfeit or cancel the policy.

ARMOUR, C.J.—This case appears to me to be a very clear one, and to depend entirely upon the question whether the policy was in force at the time of the death of the insured, for if it was, no subsequent action of the defendants could affect the plaintiff's claim.

Olmstead v. The Farmers' Mutual, 50 Mich. 200.

Upon the giving of the note for the premium and the issuing of the policy the risk attached subject to the avoidance of the policy for the non-performance by the insured of the condition subsequent—the payment of the note when it fell due.

The law applicable to the forfeiture of leases for non-performance of condition is equally applicable to the forfeiture of a

policy, such as the one in question, for the non-performance of condition subsequent therein contained.

This policy was voidable upon default being made in the payment of the note taken for the premium, but only at the election of the insurers; *Wing v. Harvey* 5 De G. M. & G. 265; *Armstrong v. Pierspond* 9 Ir C. L. 325; *Mackie v. European Co.* 21 L. T. N. S. 102.

Upon default being made in the payment of the note the insurers might have elected to forfeit the policy or they might have elected not to forfeit it but to continue, and upon the evidence before us I think it clear that they elected not to forfeit it, but to continue it.

There is not from first to last in the correspondence or in the conduct of the insurers any intimation or suggestion that they had elected to forfeit the policy, but the contrary; nor is there therein any intimation or suggestion that while electing to forfeit the policy they were nevertheless insisting on the payment of the notes, but the contrary.

The correspondence and conduct of the insurers when default was made in the payment of the first note, shows clearly that they were not electing to forfeit the policy, but to continue it, and were not while electing to forfeit the policy nevertheless insisting upon payment of the note, and affords evidence of a like election on their part down to the death of the insured.

They took for the amount of the first note and interest a new note with interest at seven per cent per annum at thirty days, and when during the currency of this note the insured wrote to them asking them what they would let him out with by cancelling the policy on July 10th, they answered him on July 4th that his request, that they should cancel the policy, was unreasonable. They were then, notwithstanding the default that had been made in the payment of the first note, not only showing that they had not elected to forfeit the policy and that they were not, while electing to forfeit the policy, insisting on payment of the note, but were also showing that they had elected to continue the policy and were treating it as then subsisting.

There is nothing to show that their course of conduct in respect of this policy as thus made manifest was in any way altered up to the time of the death of the insured.

They took for the amount of the last mentioned note a cash

payment of \$10 and a new note for \$22.40 with interest at seven per cent per annum at two months from the 10th July, 1890, and at its due date they took for the amount of it and interest a new note for \$22.80 at one month and after default was made in its payment they wrote to the insured on the fifth day of November, 1890; "7710, We fully expected to have heard from you ere this with a remittance for your note which matured on the 16th ult. Kindly give the matter your immediate attention" and before this letter reached the insured on the following day the insured was dead. Surely this letter must be taken in the light of the previous correspondence and conduct of the insurers as treating the policy as still subsisting and repelling the idea of any election to forfeit.

It was argued that because the insurers had the right while electing to forfeit to nevertheless insist upon payment of the note referred to therein, the letter must be taken to mean that they were by it merely insisting on the payment of the note, having exercised their election of forfeiting the policy; but the refusal of the insurers to receive the amount of the note and interest when tendered shows clearly that no such meaning can be extracted from the letter. The letter was written treating and intending to treat the policy as still subsisting and asking the kind and immediate attention of the insured to the payment of the note.

Supposing the insured had paid the note on the 6th of November, and had died on the 7th of November, would there be any defence to this claim? I think clearly not; and neither in my opinion is there any defence to it under the circumstances which occurred.

The plaintiff is in my opinion entitled to recover the sum insured with interest from the 1st January, 1891, less the amount of the promissory note of the insured with interest thereon at the rate of seven per cent. per annum, and her costs of suit.

The judgment by the Court of Appeals reversing this decision was delivered on January 17th, 1893, Hagarty, C. J. O.:

I feel very great difficulty in accepting the view of the Divisional Court that when the life dropped there was an existing contract of assurance with the defendant company.

Conceding for the argument that so long as they continued accepting promissory notes instead of cash for premiums, and so long as any one of such notes was current when the life dropped,

the insurance was in force, I cannot see how this judgment can be upheld.

Down to the 16th of October, the time of the last renewal, we may treat the contract as existing. The dishonor of that last note left nothing remaining. The company could at once have cancelled the risk, leaving still a liability on the assured to pay the notes on the terms of the policy.

I do not think the company were bound expressly to notify the assured that they elected to do this. It became incumbent on the plaintiff to establish with reasonable clearness some act of the company to revive the lost liability.

The case then wholly depends on their action in writing the letter of November 5.

"We fully expected to have heard from you ere this with a remittance for your note, which matured on the 16th ult. Kindly give the matter your immediate attention."

This letter never reached the hands of the person to whom it was addressed, he having died on the morning after it was written.

Now, apart from the argument that the letter may be read as merely pressing for payment of the note, even if the risk had been cancelled, the difficulty remains that nothing whatever was done upon it.

If the assured had acted on and paid the note and the defendants had accepted the payment, I do not doubt but that the plaintiff could recover on a finding that such payment was made and accepted as completion of payment of the year's premium, and not merely to pay the note on a cancelled risk.

But nothing was done, the dropping of the life was the only answer.

I should be of the same opinion even if the letter had gone much further and had specially referred to the insurance and had urged on McGeachie to pay up and thus save the insurance, the saving could only be by paying up.

If the manager had met him on the 5th of November and asked him why he did not attend to the matter and pay up the overdue note, and the other promised to do so next day, and died, say from an accident two hours afterwards, what would be the position?

If he paid he saved his insurance, if he did not, but died without paying, I think, with submission, that the contract is at an

end. Or if when this letter was written McGeachie was actually dead without the writer's knowledge, would it amount to the creation of a new contract?

The dishonor of a note given for the premium makes the insurance null and void.

Of course the company may waive the forfeiture, and so long as they continue renewing or accepting paper the contract may continue.

But the utmost evidence of waiver here amounts at most, even if the letter had reached its address, to a suggestion to do something which might, if done, preserve the contract.

Nothing was done, and I cannot believe that the law we are bound to administer can warrant a recovery.

I do not consider that the one month's grace allowed on payment of premiums can affect this question.

The whole seems based on the necessity of the first year's payment in advance being made to validate the policy. The parties agree to take paper for this and to renew such paper more than once. The month's grace can hardly apply to each note so given.

I am aware of the great latitude allowed by some of the American authorities in the dealings between assurers and insured.

In a much contested case of *Moffat v. Reliance Mutual Assurance Society*, 45 U. C. R. 561, I had occasion to examine these authorities, and then expressed an opinion that they seemed to me to go far beyond the limits of English law. I still retain that opinion.

I think my learned brother Street's judgment should be restored and the appeal allowed.

BURTON, J. A. :

I quite agree with the court below that upon the giving of the note and the issuing of the policy the risk attached, and that the policy was voidable only at the election of the company; but I am unable to adopt the reasoning that under the facts of this case there was any waiver of the forfeiture, or any act done by the company from which the assured had the right to infer that they considered the policy still in force, unless we come to the conclusion that such an agreement as that adopted by this company, conferring the right to enforce payment of the note notwithstanding the lapse of the policy, is invalid. I do not think the argument is advanced by showing that the company were demand-

ing payment of the note or even suing upon it. They might do one or the other without any intention of reviving the policy consistently with the terms of such an agreement. I think it very probable that if the demand had been responded to by payment during the life of the assured, the company would have waived the forfeiture, but they were under no legal or equitable obligation to do so.

I am free to confess that such an agreement as that in question to my mind seems somewhat inequitable, inasmuch as the company might thereby be receiving a full year's premium, whilst the assured had only been covered for six months; but people are at liberty to make their own contracts, and it is no part of our duty to make contracts for them, but merely to interpret those which they have made.

The arrangement whereby the assured elects to pay the annual premiums in semi-annual or quarterly instalments appears to me to be much more equitable. The policy is then liable to forfeiture for non-payment on the day appointed for payment, but the assured loses only the proportion of the premium during which he has been insured.

The case of *Olmstead vs. Farmers' Mutual Fire Insurance Co.*, 50 Mich 200, referred to in the judgment below, is, I think, very distinguishable. In that case there was no provision that non-payment should work a forfeiture, but that the secretary might, in a certain event, suspend or cancel the policy subject to an appeal. It was a fire policy, and so far from the policy having been cancelled up to the occurrence of the fire, the secretary had just previously notified the insured that his insurance was liable to suspension, *unless prompt attention was given to the notice*.

No act was necessary in this case on the part of the company to show that they had elected to avail themselves of the forfeiture—that was provided for in the conditions—and the letter relied on is in no way inconsistent with their having so elected. It would have been very different had they advised the assured that unless the payment was at once made the policy would be avoided.

I am of opinion, therefore, that the judgment of Mr. Justice Street was correct and should be restored.

OSLER, J. A. :

The judgment of Street, J., dismissing the action, ought, in my opinion, to be restored. I think the non-payment of the last

renewal note for the balance of the first premium raised a clear defence under the provision in the application and policy, that if any premium note, cheque, or other obligation given on account of a premium be not paid at maturity, the policy shall be void, and all payments made upon it forfeited to the company. Conceding that this means void at the option of the insurers, they were not obliged to do anything showing an election to avoid it in the life time of the insured. If the premium remained unpaid at the time of his death, the policy is void, if they set up the condition. The policy has simply come to an end. *Rochner v. Knickerbocker Life Insurance Co.*, 63 N.Y., 160; *Robert v. New England Mutual Life Insurance Co.*, 1 Disney (Ohio), 355; *Lantz v. Vermont Life Insurance Co.*, 139 Pa. St., 546 at p. 561. If before death they had accepted payment of the premium the case might have been within *Wing v. Harvey*, 5 D.M. & G., 265, and *Armstrong v. Turquand*, 9 Ir. C.L. 32 (1858), and the defendants might have been held liable, or, at most, it would have been a question upon the evidence whether they had accepted payment on the footing of the policy being in force, or under the stipulation that the premium note should be payable at all events, and notwithstanding its avoidance. Here there is nothing but the fact of default in payment of the obligation given for the premium, and a call for its payment, which never came to the knowledge of the insured. His representatives could be in no better position than they would have been in if it had come to his knowledge, and he had died without complying with it, and I do not see how, consistently with giving any force or effect whatever to the conditions of the contract, the demand can be regarded as more than an intimation to the insured, or a declaration by the defendants that if the premium was paid during his lifetime the defendants were willing to treat the policy as being still on foot. No inference can justly be drawn from it that they were treating it as unaffected by the default, and that the premium, *qua* premium, was paid by the note, in other words, that they were electing to keep the policy on foot, except on the terms of payment being made in the lifetime of the insured. In point of fact, however, the defendants' letter of the 5th November, 1890, never did come to the knowledge of the insured, as he died before it could be delivered, so that if there was an intention on the defendants' part to elect not to avoid the policy, that intention was not communicated to him; the election

never was completed, and the case is simply one of the insured dying while in default, and thus coming within the terms of the destructive condition. I refer to *Neill v. Union Mutual Life Insurance Co.*, 45 U.C.R. 593, 7 A.R. 171; *Doe Nash v. Birch*, 1 M. & W. 402, at p. 408; *Croft v. Lumley*, 6 H.L.C. 672, at p. 705.

I do not wish to be understood as saying that a demand, even if actually communicated to the insured, unless followed by actual payment and acceptance of the premium in his lifetime, would be evidence of a waiver of the forfeiture or sufficient to reinstate the policy.

In *Edge v. Duke*, 18 L. J. Ch. 183, where the company had not only demanded payment of the over-due premium, but had sued for it, they were held entitled to insist upon the forfeiture notwithstanding.

For these reasons I concur in allowing the appeal.

MACLENNAN, J. A. :

I also am of the opinion that the appeal should be allowed.

During the argument I thought the circumstance that, when the first note given for the premium was renewed it was given up to the maker, might make a difference. The first note was undoubtedly "given on account of a premium" within the condition endorsed upon the policy, but before it became due it was given up and another note was taken in lieu of it, and this process of renewal was repeated once or twice. It cannot be said that the original note under these circumstances was a note "not paid when due" within the meaning of the condition, and having been given up, if it was a paid note, it could never become anything else, or be revived by the dishonour of the renewal. Then the second and subsequent notes were not given on account of a premium, as the first was, but in payment of the antecedent ones, or at least in lieu of them. Upon reflection, however, I think it would be putting too narrow a construction upon the language of the condition to hold that the subsequent notes were not also given on account of a premium. We cannot truthfully, making a fair and reasonable use of language, say that they were not given on account of premium. It is evident that all the notes were given for that and nothing else.

Then it was said that the provision in the policy allowing a grace of one month in payment of premiums applied. It is noticeable that the grace is confined to the payment of premiums. It is

not extended to notes or other obligations given therefor. I think the month must be held to run from the regular day on which the premium was due, and if the company should take a note I think the proviso does not mean that the assured shall have a month's grace in addition to the time the note has to run. The rule of the policy is that premiums are due and payable in advance. Any departure from that rule, whether by taking a note or otherwise, is grace, and all the assured is entitled to by the terms of the policy is a month. If he gets two or more months by a note it must be taken to be in lieu of, or substitution for, the month allowed by the policy, and not in addition to it.

I now come to the ground of waiver, on which the judgment of the Divisional Court rests, and after most anxious consideration I am unable to agree with the judgment. I think with great respect there was no waiver. The cases cited by the learned Chief Justice of *Wing v. Harvey*, 5 D.M. & G., 265, and *Armstrong v. Turquand*, 9 Ir. C.L. 32, are, I think, distinguishable from the present. In those cases the companies had no right whatever to receive the premiums which they received, unless upon the theory that they waived the forfeiture. In *Wing v. Harvey* the company received premiums for years after they were aware of the cause of forfeiture, and in *Armstrong vs. Turquand* they received one premium after knowledge. The other case, *Mackie v. European Assurance Society*, 21 L.T.N.S. 102, merely decides that the company was bound by the acts of their agent.

I assume, for the purpose of this case that the company is bound by all that took place between the assured and the agent, and, looking at the correspondence, I am unable to find that the question of the forfeiture of the policy by reason of non-payment was present to the mind of the agent at any time. It is evident that what he was concerned about and was endeavouring to obtain was the payment of the note. He was not considering consequences.

He had a right to say if he chose: "Your policy is void, but I want payment of the note." But he was not obliged to say anything at all about the policy one way or another. By the terms of the contract he could demand payment of the note whether the policy was void or not. But for that, his demand of payment would be an assertion that the policy was still in force, and would be evidence of waiver; but, under the circumstances, I

am unable to see how it can be so regarded. It was argued that if the assured had paid the premium in answer to the demand it could not be contended but that the policy was thereby set up again. I think, however, that is the same proposition, and that if the money had been paid, and it turned out that the assured was suffering from dangerous or fatal illness, the company could not be held to have waived the forfeiture. When a landlord, after a forfeiture, receives rent which had become due before it occurred, that is no evidence of waiver; but if he receives rent which fell due afterwards it is otherwise. In the first case he has a right to his rent whether he intends to insist on the forfeiture or not, but in the other case there can be but one inference drawn, namely, that he has waived the forfeiture. So in this case the company had a right to demand, and even to recover, payment of the note whether they waived the forfeiture or not. And so no inference whatever as bearing on their intention can be drawn from those acts. Putting those acts aside, I think we must find in the correspondence a distinct intention in express or unequivocal language to waive a forfeiture before we can decide that they have done so, and, with great respect, I am unable to see that any such intention is there to be found.

I am, therefore, of opinion that the appeal should be allowed.

The judges of the Supreme Court, in confirming this judgment, expressed themselves as follows :

GWYNNE, J. :

The first condition of the policy was quite sufficient to entitle the company to claim that the policy was void for non-payment of the premium. It was paid by a promissory note which enabled the policy to issue, but it was agreed that if the note was not paid the policy was to be void, or, if not void, voidable, and I do not think it would aid the appellant to hold that it was only voidable. I agree with the judgment of the Chief Justice of the Court of Appeal and would dismiss this appeal with costs.

KING, J. :

The note was taken as conditional payment of the premium and, until it matured the policy was valid, but when it matured and was not paid it came within the first condition and made the policy void. I think the term void in that condition means voidable. The stipulation was for the benefit of the company, who had a right to elect whether it should be void or not. Then, was

anything done to show an intention on the part of the company that the policy should continue notwithstanding the breach of the condition? I cannot see that what was done was equivalent to an expression of any such intention. The insured had had eleven months of protection under the policy and I cannot see that the request for payment of the note would operate as a waiver of the forfeiture.

I agree in the appeal being dismissed.

78. Life insurance—Premium note—Action on, after forfeiture—Condition, month's grace—Death within, and before payment of premium.—Another important and recent decision also upon an unpaid premium note is that of *The Manufacturers' Life Insurance Co. v. Gordon*. It may be summarized as follows: Under a life policy providing that "a grace of one month will be allowed in payment of premiums, at the expiration of which time, if said premium remain unpaid this policy shall thereupon become void" and also that "if any note given on account of the premium be not paid when due, this policy shall be void and all payments made upon it shall be forfeited to the company," the insurance comes to an end upon default in payment of a premium note, unless the insurers elect to keep it in force, and proceedings by the insurer to collect a note given for a premium are not sufficient evidence of such election. Nor are equivocal acts such as carrying the policy in the books of the insurers as an existing policy and including the amount in their official returns of insurance in force any evidence of waiver of the forfeiture, these acts not being known to the insured or intended to influence his conduct.

"Month" in an insurance policy in the form here in question, with provisions for payment of semi-annual premiums on named days of specific calendar months means a calendar month.

Per Haggarty, C. J. C., and Osler, J. A. Semble. Payment must be made during the life of the insured, and if the life drop before the expiration of the time of grace and before payment the risk comes to an end.

Per Burton and MacLennan, JJ. A. Payment may be made at any time before the expiration of the time of grace, whether the life has dropped or not.

Judgment of MacMahon, J., reversed.¹

¹ *Manufacturers' Life Insurance v. Gordon*, 20 A. R. 309; *McGeachie v. North American Life Assurance Co.*, 20 A. R. 187 and 23 S. C. R. 148 applied and followed. See *supra* § 77.

This case is of so much interest that it may be well to give here the opinions of the judges in full.

The decision in the first court was as follows :

MACMAHON, J. :

Action for the cancellation of a policy of insurance issued by the plaintiff company on the life of Daniel John Baillie Gordon, for the sum of \$5,000 (the amount being made payable to his wife Kate S. Gordon, the defendant), upon the ground that a note given by the insured, the said D. J. B. Gordon, which matured on the 8th October, 1891, for the half year's premium falling due on the 5th of July, 1891 (being within two years of the issuing of the said policy), was not paid at maturity, and thereupon, as the plaintiffs allege, the policy became null and void under the conditions contained in the application and policy. The policy is dated the 22nd of July, 1890, and by its terms the semi-annual premium of \$77.75 is to be paid in advance to the company on the 5th days of July and January in each year. By one of the provisions of the policy—(H)—“ a grace of one month will be allowed in payment of premiums, at the expiration of which time, if said premium remain unpaid, the policy shall thereupon become void. But a reinstatement will be permitted if application therefor be made in writing to the company at its head office within two months after the expiration of the one month's grace, accompanied with a certificate of good health from a medical examiner of this company, subject to its approval, provided always that whenever advantage is taken of this grace or of the privilege of reinstatement, interest shall be paid to the company at the rate of six per cent per annum for the time deferred.” And on the back of the policy is endorsed : “ If within two years from the date named for the commencement of this insurance * * * any note, cheque or other obligation given on account of the first or second year's premium be not paid when due * * * this policy shall be void and all payments made upon it shall be forfeited to the company,” etc.

At the foot of the medical examination, which was signed by Gordon (and which was referred to in the application as forming part of it), there is an agreement that if any note or other obligation given for the first or any subsequent premium be not paid at maturity the policy shall thereupon become void, but the note, etc., must nevertheless be paid.

This cannot be deemed a condition or stipulation in any way

modifying the effect of the policy, as under section 27 of R. S. C., cap. 124, all conditions, stipulations and provisos to affect any policy after the 1st of January, 1886, to be valid, must be set out on the face or back of the policy. The half year's premium due on the 5th July, 1891, not being paid when due, the agent of the company at Ottawa delivered the receipt for the premium to Gordon and accepted his (Gordon's) note dated 5th August, payable in sixty days, for the amount, \$77.75, which was not paid at maturity. The company's agent at Ottawa on the 9th of November notified Gordon that if the note were not paid by the 16th it would be put in suit for collection.

The note was put in suit on the 3rd of December, and judgment was entered on the 30th of December, 1891, for the amount of the note, with interest and costs. On this execution was issued, which was returned *nulla bona* on the 7th of February, 1892. The Division Court bailiff said he had advertised Gordon's goods for sale, and that they were under seizure until Gordon's death, which occurred on the 4th of February. He said he might have realized fifty or sixty dollars from a sale of the goods, and the reason he did not sell was because there was a settlement with the company's solicitors, who agreed to accept ten dollars per month on the execution. A letter from the plaintiff's solicitors, dated 18th of January, 1892, was put in, in which they state the company is willing to accept payment of the claim in instalments of ten dollars per month; the first payment to be made immediately, and the bailiff's fees to be paid by Gordon.

The offer was not acted upon, as no instalment was paid in accordance with its terms. In fact, when the letter reached Gordon he was suffering from the illness from which he afterwards died.

On the 21st January Mr. T. C. Bate saw the company's agent, A. E. Bradbury, to whom he said he had called to pay the judgment and the next premium, when Bradbury said he would ascertain the amount of the Division Court costs, and would let him (Bate) know the whole amount. On this occasion, which was the first Bradbury said he heard of Gordon's illness, Bradbury gave Bate a "health certificate," which he desired should be signed by Gordon. Bate said that Gordon did sign the certificate in blank, but it was never filled up, and was not returned to Bradbury. On the following day (22nd January), Bradbury went to Bate's office and said he had given him the wrong certificate, and then gave

him a short form medical examiner's certificate to be filled up after a re-examination of Gordon by the company's medical examiner. This the company's agent considered necessary, because, as he stated, thirty days had elapsed since the premium was overdue—he referred to the premium represented by the promissory note, which had been overdue since the 8th of October previous. On the 22nd of January, 1892, the solicitor of the company informed Mr. Bradbury that their expenses (I suppose costs) in connection with the judgment in *Manufacturers Life v. Gordon*, amounted to \$8.89, which included the solicitor's fees payable by the company. On the 5th of February, Mr. Christie, the solicitor for Mrs. Gordon, tendered the solicitors of the company \$82 in payment of the judgment, and on the same day Mr. Bate tendered to the agent of the company \$78 for the half-year's premium, which fell due on the 5th January, 1892, which was refused.

On the 8th of February, 1892, the managing director wrote the company's agent at Ottawa a letter in which he was asked, "Did he (Gordon) know from you that the policy had lapsed?" The general manager then states: "I cannot approve of your haste in putting this matter in the hands of a solicitor for collection. It matured last October, and it would have been far better to have waited a few months before suing. Had you let the matter stand as overdue until after the 5th of February, they could not possibly have made any claim with any ghost of a show; as it is now they are going to make use of the judgment as a strong point in the contention that we considered the policy in force." On the 10th of February the agent answered the managing director's letter, and in reply to the query as to notifying Gordon, he said: "As to whether I notified Gordon that his insurance had lapsed, I do not remember, but Gordon knew such was the case, for he met me on the street and told me the company was suing him for his note. I remarked, 'Well, you can't blame me.' He said, 'I suppose my insurance is gone now anyway.' I then said to him, 'Pay the note and we will get you reinstated.'" These letters were put in by the defendant's counsel. The receipt given to Gordon when the company accepted his note is as follows: "Received from the owner of policy No. 6344, the semi-annual premium due July 5th, 1891, \$77.75. John F. Ellis, managing director." The note was accepted in payment of the premium, but by the condition endorsed on the policy, upon the non-payment of the note the policy became

forfeited, unless there was a waiver by the company of its right to enforce the forfeiture. The right of forfeiture is for the benefit of the insurers, and they may chose not to enforce it. And when the insurers had, as in this case, the promissory note of the insured, the company may intend to still carry the risk and enforce payment of the premium. The payment of the annual premium upon a policy of life insurance is a condition subsequent, the performance of which may or may not, according to circumstances, work a forfeiture of the policy. *Thompson v. Insurance Co.*, 104 U. S. 252. The company by demanding payment of the note; by suing for the amount of the note and the accrued interest thereon; by obtaining judgment and issuing execution thereon; making a seizure thereunder, and claiming to recover the amount of such judgment down to the day of the death of the insured, are, it is urged, estopped from setting up that the policy was forfeited by non-payment of the note at its maturity. Mr. McCarthy urged, on the authority of *Knickerbocker Life Insurance Co. v. Pendleton*, 112 U. S. 696, that there was an absolute forfeiture of the policy by non-payment of the note, and that the company was entitled to sue and recover the amount of the note (the insured having had the benefit of the insurance during the interval) without waiving the forfeiture. In that case there was nothing done by the company evidencing a waiver of the forfeiture after the maturity of the bill which had been accepted in payment of the premium.

To the same effect is *Thompson vs. Knickerbocker Life Insurance Co.*, 5 Bigelow Life Ins. Cas. 8. Had the company in this case been paid the amount of the overdue note and interest when the notification was sent by the company's agent to Gordon on the 9th of November, or had the judgment been paid by Mr. Bate on the 21st of January, 1892, there can hardly be a question that the then receipt of the premium would have been a waiver of any forfeiture. Even in the case where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such receipt: *Davenport v. The Queen*, 3 App. Cas. 115. The company did not deal with the policy as having been forfeited. It was carried in the company's books as an existing risk; and in the statutory return made to the Government, sworn to by the president and managing director, on

the 24th of February, 1892, the policy issued to Gordon is included as being amongst those in force on the 31st December, 1891. The contract being unilateral, it is only by receiving and accepting Gordon's note that the company was in a position to sue for the purpose of enforcing payment of the premium. Had Gordon's goods, which were advertised for sale on the 16th of January, been sold under the execution, it is possible they might have realized sufficient to meet the judgment, in which case the premium would have been paid for the half year ending the 5th of January, and the month's grace for payment of the succeeding half year's premium would not have expired until the 5th of February, 1892. However, within the month's grace the amount of the judgment debt and costs was tendered to the company's solicitor, and within such month's grace the premium for the succeeding half year was also tendered to the company's agent and refused. A question arose as to whether under the policy the month's grace should be considered a lunar or a calendar month. In *Simpson v. Margitson*, 11 Q. B. 23, where the words in a written contract were, "if the estate were not sold within two months," it was held that this by itself meant "two lunar months," unless there were admissible evidence that the parties meant "calendar months." So in *Nudell v. Williams*, 15 C. P. 348, where in a lease the plaintiffs were entitled to "the month" next after the expiry of the old lease within which to pay for improvements, it was held that the naked expression "month" meant a lunar month. In *Hart v. Middleton*, 2 C. & K. 9, Pollock, C. B., said: "In legal matters 'a month' means a lunar month, but in commercial matters 'a month' always means a calendar month. In bills of exchange, promissory notes, invoices, times of credit, and everything else relating to commercial matters it is so; and I know of no instance to the contrary." The issuing of a policy of insurance can hardly be regarded as a commercial matter, so that authority does not help. In *Simpson v. Margitson*, 11 Q. B. 23, Lord Denman, C. J., at p. 32, said: "Nor can we find any authority for saying that the conduct of the parties to a written contract is alone admissible evidence to vary the meaning of the word 'month.'" However, in the present case the company in accepting the note of the 5th of August treated month as a calendar month in the business of life insurance. The letter from the agent at Ottawa of the 5th of February to the managing director of the company, in which he says, "The days of grace of the

second half year expire to-day," and the letter of the managing director to the agent of February 8th, in which he states, "Had you let the matter stand as overdue until after the 5th of February, they could not possibly have made any claim with any ghost of a show," is evidence of what the meaning of "month" is in the particular business of life insurance. See *Simpson v. Margitson*, 11 Q. B. 23, at p. 32. If there is any question as to this the defendant should be allowed to give further evidence on the point as to the sense in which the word is used in the particular business of insurance. The case of *Simpson v. Accidental Death Insurance Co.*, 2 C. B. N. S. 257, to which counsel for the plaintiffs referred, turned upon a condition in the policy permitting the directors, when a new premium should become payable, to terminate the risk by refusing to accept such premium. In *Want v. Blunt*, 12 East 188, also cited, where a tender of the premium by the member's executors within fifteen days' grace allowed by the policy of the society was held too late, the judgment turned on the rules of the society which required the payment, when made during the days of grace, to be made by the member in his lifetime in as good health as when the policy expired. And in *Lantz v. Vermont Life Insurance Co.*, 189 Pa. St. 546, where the authorities are reviewed, the policy stipulated for the payment of quarterly premiums by the assured, provided that should they not be paid at the dates named in the lifetime of the assured the policy should cease and determine. Under the term in the policy giving a month's grace within which to pay the premium, the tender on the 5th of February was a good tender. The plaintiff's claim must be dismissed with costs, and the defendant's counter-claim must be allowed, and judgment entered for the defendant for the sum of \$5,000, less \$77.75, with interest from the 5th of February, 1892, and full costs of suit.

The plaintiffs appealed and the appeal was argued before Hagarty, C. J. O., Burton, Osler, and MacLennan, J. J. A., on the 2nd and 3rd of February, 1893.

In appeal.

HAGARTY, C. J. O.

A semi-annual premium was payable on the 5th January; it was not paid. The insured died on the 4th of February, the premium still unpaid, but within the month, and on the 5th February, also within the month (if the month be calendar) the amount was tendered and refused.

The life, the subject matter of the insurance contract had dropped, a premium being in default. The beneficiary under the policy (the defendant) insists that a payment was tendered within the month, that there was in fact no default but an absolute continuance of the risk until the end of the month.

I feel great difficulty in accepting this view.

The whole scheme of insurance seems based upon the payment in advance at the commencement, or, as it were, to start the running or inception of the risk. When default was made by non-payment on the 5th of January, the risk was at an end or had ceased to continue, subject to a provision in the way of a grace or indulgence to the assured by payment within a month; but under another provision, with interest from the time of actual default. But if the assured die on the 2nd day of the month without payment, are his representatives entitled to offer payment twenty-nine days after the life had dropped? That is the proposition the defendant has to assert.

I do not profess to know anything as to the usage or custom of Life Assurance Companies or how they are pleased to understand such provisions. I have nothing to guide me on this question of construction beyond what the Appeal Book presents, and the arguments of counsel thereon, and the external evidence.

On the very fullest consideration which I can bestow on the case, it appears to me that after the life has dropped, no tender or offer to pay can avail.

The whole subject matter of the insurance was gone and the risk had terminated. If not, then in the case just suggested, the risk continued for say 28 days until the month was nearly up; although the company had no existing premiums to support the risk, and never might have any, nor could they enforce any. The representatives might tender or not as they pleased.

I think we must construe the policy as only granting this grace so long as the life was in being, so long as there was a life which the risk covered or to which it applied. A half yearly or yearly premium, paid in advance, is an unmistakeable right to insurance for that period, absolute as a matter of contract. For an extra month payment will re-establish the contract; but there must be the existence of the life on which the risk is to continue or to attach. Reading this provision "H" as offering two extensions of time we have first the option or privilege of paying within

a month; secondly, an agreement to reinstate the assured for a period of two months after end of the month on condition of his being in good health, etc., and then if advantage be taken "of this grace or of the privilege of reinstatement" interest at 6 per cent shall be paid for the time deferred. I think the whole of this provision points irresistibly to the assumed existence of the life when either the grace of one month or of the extra two months, is sought to be availed of.

There is a whole month given within which the risk on the life may be kept alive.

The words "at the expiration of which time, if said premium remain unpaid, the policy shall thereupon become void," must mean as addressed to a living man: "if you let this month pass without paying up, your policy is void."

Here the life dropped with a premium in advance unpaid. The tender after death could not, in my judgment, avail.

The whole subject matter of insurance was gone, and the risk ceased. Death before payment within the month closed all as it seems to me. Payment within it started the risk again, if the subject to which the risk attached still existed.

We have not been referred to any direct authority on this point.¹

Byles, J., says in the much quoted case, *Pritchard v. Merchants Life Assurance Co.*, 3 C. B. N. S. at p. 644, "As to the effect of a payment of the premium on a life policy after the expiration of the period covered by the policy, and within the number of days usually allowed by the conditions for making the payment, or as they have sometimes been called the days of grace, I am not aware of any authority on the subject, except what fell from this court in the recent case of *Simpson v. Accidental Death Insurance Co.*, 2 C.B. N.S, 257."

The facts in *Pritchard's* case were too unlike the present to be a guide. But the remarks of the judges throughout the case incline my mind to the belief that payment within the named time of grace must be while the life (the subject matter) is in existence.

On the other branch of the case as to the previous half year's premium and the alleged waiver by the company, or the effect of their action on the note and other proceedings, I have had the

¹ For the Quebec law see C. C. L. C., 2583, 2585, *supra* § 73.

advantage of reading the judgment of my brother Osler, and I adopt his reasoning and conclusions.

I think the appeal must be allowed.

BURTON, J. A. :

There are two questions involved in this appeal. First, whether the policy was avoided on the non-payment of the note, and second, if not so avoided, whether the tender of the premium on the 5th February, after the death of the assured, was sufficient.

I deal with the last question first.

I am, I confess, a little surprised at any question arising at the present day as to the liability of a life assurance company, where the assured dies within the days of grace but before the payment of the premium, provided that it is paid within the extended period. In practice no company disputes such liability, and in most cases they have remodelled their contracts so as to place the matter beyond question.

This was done in consequence of the dicta which fell from some of the judges during the argument in *Pritchard v. The Merchants, etc. Life Assurance Society* and *Simpson v. Accidental Death Ins. Co.* in 1854, which led to an almost universal change in the form of life assurance policies, so as to remove all ambiguity or doubt upon the subject, and no one doubts that a policy of assurance, like all other written contracts, must be construed according to the meaning of the parties expressed in it.

As the point was strenuously urged in the present case and in another recently before us, I shall discuss it more fully than I should otherwise have done, as I considered it as perfectly well established that since that change the liability was unquestioned.

A good deal of confusion has arisen from treating a contract of life assurance as a contract of indemnity, whereas it is a mere contract to pay a certain sum of money at a certain time in consideration of certain stipulated payments.

The contract is not like a fire or marine assurance policy for a single year or a single voyage with a privilege of renewal from year to year by paying the annual premium, but is an entire contract for assurance for life subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract and such is its character.

The question first arose in a fire insurance case—*Tarleton v. Staniforth* 5 T R. 695. The insurance was from half year to half

year as long as the insurers should agree to accept the same, with 15 days grace, but there was to be no insurance until the premium was actually paid.

The loss occurred within the 15 days but before the payment of the premium.

The previous half year's contract was at an end ; two things had to concur before any new contract of insurance was effected, that the insured should pay the premium and that the insurers should agree to accept it.

There was in fact no contract then in existence, and if the premium had been tendered before the fire the company was not bound to accept it.

The question in all these cases is whether upon the true construction of the whole instrument the loss occurred whilst the policy was still in force, and although it is quite clear that *Tarleton v. Staniforth* was, under the facts in that case, rightly decided it effected a revolution in that kind of business. The Sun Fire Office issued an advertisement stating that all persons insured in their office by policies for one year or any longer term were and always had been considered by the managers as insured for 15 days beyond the time of the expiration of their policies.

In an action brought some time subsequently against the same office, *Salvin v. James*, 6 East 571, it was held, this did not stop them before the expiration of the insurance from declaring that they would not renew the insurance except at an increased premium, and that they had still the right therefore to decline to renew the insurance, but the court there held, that in default of reasonable notice, before the expiration of the contract to that effect, the policy would have remained in force for the 15 days, and the company would have been liable notwithstanding that the premium had not been paid before the loss.

To the same effect is *McDonald v. Carr, Hayes and Jones*, 256, where on the true construction of the policy, it was held to be in force for one year and fifteen days.

These are all different from the case we are considering, which is one of a contract for life, not determinable at the will of the assurer.

The case of *Want v. Blunt*, 12 East 183, has no application. That was a case of a member of a society effecting a policy of assurance in consideration of a payment by him during his life, and

the payment of his proportion of the contributions which the members of the society should during his life be called on to make.

The court held that no person could be assured unless he was a member; that the members were insuring each other, and that the paying a premium for another quarter was making a new assurance, and that the whole frame of the policy showed that every premium must be paid during the life of the assured.

If that was the true construction of the policy it warranted the conclusion arrived at.

I come now to the two cases the dicta in which led to the change in the frame of the policies now generally in use.

The first of these, *Simpson v. The Accidental Death Insurance Company*, was not a case of life assurance in the ordinary sense of the term but was an insurance against accident.

There, as in *Tarleton v. Staniforth*, the company were not bound to accept the premium if tendered, and it was in effect a grant of so many days during which the assured might effect a renewal if the company chose to renew, but not otherwise.

The case of *Pritchard v. Merchants, etc., Life Assurance Society* has little bearing on this case, except for some of the dicta which fell from some of the judges during the argument; the payment there was not made until after the death and *after the expiry of the days of grace*. The policy, as in the other cases quoted, provided for the quarterly payments *during the natural life of the assured*, and the policy had ceased to have any force, and could only have been renewed if the assured had been living on complying with certain formalities and conditions.

Now, as I have remarked, in consequence of the doubts created by the dicta in these cases the assurance companies decided to alter the forms of their policies so as to remove all doubts and prevent parties being entrapped into believing themselves covered by insurance when they were not so covered, and no one doubts that they can by express stipulation extend the policy in that way.

Have they done so in this case? The policy does not in terms provide that the premiums are to be paid by the insured or during his lifetime. On the contrary, the contract is with the wife, and is to pay her the sum assured upon proof of the death of the assured *during the continuance of this policy*, and then we find a clause that a grace of one month will be allowed in payment of premiums, at the expiration of which time if the said premiums

remain unpaid, the policy shall thereupon become void. If therefore, this payment was made within the month, can it be said it was not in full force, notwithstanding the risk had become a claim? Reading the whole contract together, and the interpretation placed upon it by the company, I think we are bound to hold that the month's grace was a calendar month and that at the time of the tender the contract was a continuing contract and in full force, unless avoided by the default in non-payment of the note.

In the view I take of the other point, it was not strictly necessary that I should express any opinion on this one, but if there is any doubt upon the question the matter is of too great and too general importance to justify any judge of an Appellate Court passing it over in silence. There are no doubt thousands of persons insured under policies covering several millions of money, who are in the constant practice of deferring the payment of the premiums until shortly before the expiry of the days of grace, without feeling the slightest doubt of their perfect safety in so doing, and the fact that the persons who have made a special study of this particular business have by almost a universal consensus of opinion for many years placed the construction that has been placed by them on the meaning of the extension of the days of grace is entitled in my opinion to very great weight.

I forget whether it was Lord Blackburn or Lord Bramwell who once said: "Show this contract to the first hundred business men you meet with on the street, and I do not doubt but that each of them will place the same construction upon it," adding that he was free to admit that that construction was much more likely to be correct than that of himself, who knew nothing of the business, or that of a whole bench of judges. I quote from memory the substance of what was said, but Lord Westbury in the case of *Thompson vs. Hudson*, L. R. 4, H. L. I., used language almost as treasonable; and Lord Bramwell comments in a similar way upon the incongruity of referring to him who was neither a fishmonger nor a carrier, nor with any knowledge of their business, to say whether a contract made by a fishmonger and a carrier of fish, who knew their business, was just and reasonable.

It is well, however, to point out that one occasionally finds policies which are open to the objections suggested by the judges in the course of the argument in *Pritchard's case*, and that parties

may possibly, in such cases, be left to the mercy or the sense of justice of the assurance company.

In the present case there is not, in my opinion, any room for any possible doubt. The company agrees to pay if the death occurs during the continuance of the contract. That contract did continue in full force and validity until the expiry of the days of grace. After that time, if the payment had not been made or tendered, the contract was at an end, but not till then ; and if the assured had been living, could only have been revived after that time on the terms mentioned in the condition. One is an absolute right extending the contract ; the other is purely discretionary with the company on certain facts being established to their satisfaction.

The death of the assured did not terminate the contract any more than the loss of the building in the *Salvin v. James*, and in *Macdonald vs. Carr* terminated the contract. The fact that the subject matter no longer exists has nothing whatever to do with the continuance of the contract.

But upon the other point the policy was avoided on non-payment of the note, unless the suing upon it can be treated as a waiver. I do not see how we can, consistently with our decision in *McGeachie vs. The North American*, hold this to amount to a waiver unless we are to hold that the provision contained in the application in these words :—

“If a note, cheque, draft or other obligation be given for the first or a subsequent premium or any part thereof, and if the same be not paid at maturity, it is agreed that any insurance or policy made on this application shall thereupon become null and void, but the note, cheque, draft or other obligation must nevertheless be paid,” comes within section 4 of the Ontario Insurance Act 52 Vic. cap. 32, as a term, condition, stipulation, warranty or proviso, modifying or impairing the effect of any contract of life insurance, in which case it would require to be set out in full on the face or back of the instrument forming or evidencing the contract.

I do not see how this can be regarded as in any way modifying or impairing the effect of the contract. It is an agreement in no way affecting the contract, but defining what the rights of the parties shall be in respect of the note so given for the premium. The effect of the non-payment at maturity is disclosed in a condition which is set out in full upon the back of the policy, and the

only object of this collateral agreement is to avoid all doubt about the suing on the note being considered a waiver of the previous forfeiture.

I regret, therefore, that I am unable to find anything which operated as a waiver of the forfeiture, and I think the appeal must be allowed.

OSLER, J. A.

I am of opinion, with all respect for the learned trial judge, that no waiver or estoppel arises out of these preceedings. The effect of the note was to continue the policy in force for two months beyond the month's grace so that the deceased was insured for three months out of the half year for which the premium was payable and had death occurred during that time the policy would have become a valid claim. On non-payment of the note, however, it became void by the express terms of the condition. But the condition says nothing of the note becoming void. It is, and remains a contract with the company for which the maker has received, up to the time of its maturity full consideration. In the absence of an express stipulation that both contracts shall be avoided if default is made in payment of the note, effect must it seems to me be given, both to the condition and to the note. By the former the policy is expressly declared to be void, but the maker's liability upon the note continues without any stipulation that an attempt to enforce it shall re-instate the policy which had been avoided or simply ceased to be in force by the mere fact of non-payment. It is quite consistent with this that acceptance of payment of the note by the company after default should be treated as a revival of the policy, but why should anything short of this be held to have effect? It is said that it is inconsistent for the company to sue the note, and at the same time say that the policy for the premium on which it was given is forfeited, but that cannot be so if the liability upon the note has not been extinguished by the omission of the maker to pay it or unless the assertion of a right to payment of the note whether by a mere demand or by suing it is to be regarded as an acceptance of it absolutely *qua* payment of the premium, though the company may never be able to recover anything upon it from the policy-holder. I think the defendant's case must be pushed as far as that. The maker, in short, has bound himself to pay the note, and the company have stipulated that if he does not pay when it is due the policy shall be

void. This is the legal position of the parties. I cannot see how the company by asserting their legal right upon the note, waive or are estopped from asserting another legal right when they have done nothing which would make it fraudulent for them to insist upon it, or how anything short of payment by the insured in his lifetime accepted by the company, relieves him from the forfeiture or entitles him to say that they have treated the premium as paid or the forfeiture waived by suing or obtaining judgment on the note.

I refer to *Edge vs. Duke*, 18 L. J., Ch. 183, where it was held that the insurance company had not waived a forfeiture incurred by non-payment of the premium either by demanding payment of it or by bringing action therefor. See also *Ware vs. Milville Fire Insurance Company*, 45 N.J., 177 ; *May on Insurance*, 3rd ed., sect. 362 ; *Bunyan's Law of Life Insurance*, 3rd ed., 360.

I cannot agree that the other acts of the company upon which the defendant relies, such as carrying the policy in their books as an existing risk, including it (though not specially) in the official return of policies in force on 31st December, 1891, are any evidence of waiver of the forfeiture. They are all equivocal in their nature, capable of explanation, not intended to influence the conduct of the insured, and not, in fact, communicated to him, or known by him. *Insurance Company vs. Wolff*, 95 U. S. 828 ; *Wilmot vs. Barber*, 15 Ch. D. 96, page 105.

As I hold that the default in payment of the note given for the July premium avoids the policy, and that the forfeiture thereby occasioned has not been waived, the non-payment of the January premium is of no consequence. But upon the two important questions raised in reference to that premium, viz. : whether the term "month" in the clause giving a month's grace for payment of the premium is a lunar or a calendar month, and, secondly, whether a tender of the premium is sufficient if made during the grace but after the death, I may briefly say (1) that I think it sufficiently appears from the other parts of the policy that the term is used in the sense of being a calendar month, because other periods of time are mentioned which are ascertainable only by reference to the latter and calendar months expressly named, *e. g.* the premiums are payable on the 5th days of July and January in every year, which shows that the calendar year, or "a twelve-month," is intended, and not "twelve months," and the policy:

speaks of the semi-annual premiums, again implying calendar months, six of which go to the half year. *Catesby's case*, 6 Rep. 377. No doubt it is well settled in our law that in a written contract, subject to certain exceptions, the word "month" describes at law a lunar month unless there is admissible evidence of an intention in the parties using the word to describe a calendar month. The leading case is *Simpson vs. Margitson*, II Q. B. 23 ; and see also *Turner vs. Barlow*, 3 F. & F. 946 ; *Hutton vs. Brown*, 45 L. T. N. S., 343 (1881), per Fry, L. J ; *Hart vs. Middleton*, 2 C. & K. 10 ; *Lang vs. Gale*, 1 M. & S. III. *Stroud's Judicial Dictionary*, Tit. Month. But such evidence may be drawn from the context of the instrument, and we may here justly infer that the parties did not mean to employ the term in this particular clause in any other sense than that in which it must be understood in reference to other periods of time which are spoken of, and which are made up of calendar months, or which are described by the usual names of such months. It is to be regretted that this distinction between lunar and calendar months should still prevail in our law since the ancient and derivative meaning of the term is obsolete as applied to ordinary business affairs and transactions of life in this country, and the statutory rule as given by the Interpretation Act might well be made of general application.

In the United States the common sense rule has generally been adopted : *Sheets v. Selden's Lessee*, 2 Wal. 117, at p. 189 ; *Gross v. Fowler*, 21 Cal. 393 ; *Strong v. Birchard*, 5 Conn. 387 ; *Brewar v Harris*, 5 Gratt. 285.

The other question seems to me one of some difficulty. The language of the policy is obscure, and though framed in more general terms in some respects than the policies in question in the English cases, *Simpson v. Accidental Death Insurance Co.*, 2 C.B.N.S., 257 and *Pritchard v. Merchants*, 3 C.B.N.S., 622. the present inclination of my opinion is that it must be construed as meaning that payment of the premium must be made in the lifetime of the insured. The clause as to reinstatement which is found in direct connection with the "grace" clause implies the continuance of the life at the end of the month, and to hold that the grace continues after the death to the end of the month involves the absurdity, that, although the policy has become a claim by death within a month so that the premium ought then to be a mere matter of account, it will be avoided, by the express terms of

the provision and the claim defeated, by the omission of the insured's representatives who may know nothing about the matter, to pay the premium in cash before the expiration of the month. I doubt if the reference in the first clause of the policy to the deduction of "the balance of the current year's premium, if any," has anything to do with the case of death during the month's grace. It seems rather intended to provide for a case where the company insure upon a stipulation for a yearly premium, which may have been divided into quarterly or half-yearly payments for the convenience of the insured who afterwards happens to die during the quarter or half year, and then the company deduct the balance of the yearly premium. The undertaking of the company to pay on proof of death during the continuance of the policy does not assist the argument. The question is whether the policy is continued during the month if death ensues before payment. If the company had intended to be liable in that event they could easily have said so. The question is seldom likely to arise since the circumstances must be rare in which a company will think it prudent as a matter of business to raise it. We must, however, be guided by what they have chosen to express by their contract and not by their practice, how general soever that may be, though of this indeed, we have no means of knowing. If their intentions are good, they will, now that this ambiguity in their contract has been pointed out, readily find a way to remove it. I must add that I do not wish to be understood as expressing a final opinion on this point, which though suggested in the hearing was not really argued. I merely desire to point out that the question is not so absolutely free from doubt as the respondent's counsel asserted it was. There are cases in the American courts such as *Warden v. Guardian Mutual Life*, 39 N. Y. Sup. Ct. 317, which favour the respondent's contention on this point, but the frame and wording of the policies in question are so different that they cannot be accepted as safe guides in a case like the present.

The appeal must be allowed and the counter-claim dismissed on the ground of the non-payment of the July premium.

MACLENNAN, J. A. :

The learned judge held that, although by non-payment of the note at maturity the policy became void by virtue of the condition, the forfeiture had been waived; and as I understand his judgment, that the waiver was by the proceedings taken to enforce payment

of the note. Unless that conclusion of the learned judge can be supported, the appeal on the counter claim must succeed, and it is not necessary to consider the question upon the premium of January or the sufficiency of the tender of the premium after the death of the assured or some other questions which were argued before us.

The premium was due on the 5th of July. The previous one had been due and had been paid on the 5th of January. They were payable in advance, and but for the stipulation for the month's grace payment on the 5th July would have been a failure on the part of the assured to comply with one of the conditions named in the policy on which the company's promise rested, and would have been a good answer to an action for the money. It follows that the 5th of July was one of the days of grace. It was the first day of the month of grace. If so, the 4th of August was the last day, and no payment having been made on or before that day, the company might have refused to receive it, and have withdrawn from their contract. They did not do so, however. They received the note of the assured at sixty days, and they gave him the usual official receipt for the premium. I think that was a clear waiver of the default on the part of the assured. It could mean nothing else. They were not obliged to receive it, nor was the assured obliged to give it. But the assured did give his note and the company received it and gave him a receipt for the overdue premium, and it is quite clear that during the currency of the note the risk continued. It seems equally clear that, but for the condition endorsed on the policy as to the effect of non-payment of the note at maturity the risk would have continued until the 5th of January.

That condition, however, declared that non-payment at maturity would avoid the policy, and the non-payment occurred. The policy therefore clearly became void on the 8th of October, unless it was again set up by some act of waiver. The proceedings to recover payment of the note were of the most unequivocal kind, and if the company had no right to take those proceedings except on the theory that they were still on the risk, it would be the strongest evidence of waiver. The question, therefore, arises, had the company a right to insist upon the forfeiture and also to recover the note, and could the assured have set up any defence against the note on the ground that the policy had lapsed?

I think there can be but one answer to that question. The note was given for valuable consideration. In consideration of getting it the company set up again the contract which had ceased to be any longer binding on them, and came under risk once more. This risk continued for sixty days, during which, if the assured had died, the company would have had to pay. There was no total failure of consideration nor even a partial failure, for having regard to the condition, the consideration for the note was an insurance, for six months if paid punctually at maturity, and an insurance till the 8th of October and no longer if not so paid. The assured had therefore received full consideration for his note and was liable to pay it whether the company chose to insist upon the forfeiture or not. That being so, the proceedings taken by the company can be no evidence of waiver, and I think there was nothing else in the case which could be seriously relied on for that purpose.

I am therefore of opinion with great respect that the appeal on the counter claim should be allowed and that both the claim and counter claim should be dismissed with costs.

It is not necessary in this view to decide whether payment could be made after the death of the insured, and before the expiration of the time of grace, but I may say that in my view the payment could be so made.

Appeal allowed with costs.

The Court was equally divided as to whether the claim failed by reason of the death before the premium was paid though before the expiration of the month's grace. The Court was, however, unanimous in holding the term "month" to mean a calendar month and not a lunar month.¹ It would also appear from this decision (1) that a condition making a policy void upon non-payment of a note given for a premium is not such a condition as is required by section 27 of the Insurance Act in order to be valid, to be set out in full on the face or back of the policy, and (2) that a company has the right to insist upon the forfeiture of the policy, upon the non-payment of such a note at maturity, and also to sue and recover upon the note.²

79. Life insurance — Premium notes — Non-payment—Forfeiture—Conditions.—Another recent and similar case is that of

¹ See Act of 1893, Sec. 12 (O.)

² See Report of Superintendent of Insurance for 1892.

Frank v. Sun Life Assurance Company. In that case the assured gave to the company, to cover the first annual premium payable under a policy of life assurance containing no condition as to forfeiture for non-payment of premiums, two instruments in the form of promissory notes at ninety days and a hundred and eighty days from the date of the application, each containing a provision that if payment were not made at maturity the policy should be void. The first note was not paid at maturity, and while it was unpaid, and before maturity of the second note, the assured died.

Held, Haggarty, C. J. O., dissenting, that without any election or declaration of forfeiture on the part of the company the contract came to an end upon non-payment of the first note and was not kept alive by the currency of the other note.¹

The dissenting opinion of the Chief Justice set up the facts that the application was made 28th March, 1889, and the policy, dated 1st April, was declared to be in consideration of \$34.45, to be that day paid as premium for twelve months, and a like sum on every 1st April thereafter, and that said policy was not binding until after first premium was paid. The defendants took two notes in payment of the premium containing the stipulation above referred to.

The policy was duly issued to the assured.

The first note matured 29th June, when the alleged attempt at settlement was made. Deceased paid nothing on it. The second note did not mature until 27th September.

During its currency the life dropped on July 19th.

The agent, Adams, who sought to prove the abandonment of the contract, said he had applied to him several times during the currency of the notes, but the assured always said he could not pay.

The defendants insisted that the dishonour of the first note avoided the policy on the allegation that its non-payment according to the terms should have that effect, but it also provided that "this note is nevertheless to be paid."

I agree with the learned judge that these notes must be taken to have been accepted as payment of the first premium, and that the policy had become binding. It is sought to avoid it by the

¹ *Frank vs. Sun Life Assurance Co*, 20 A.R. 564. *McGeachie vs. North American Life Assurance Co.*, 20 A.R. 187, and *Manufacturers' Life Insurance Co. vs. Gordon*, 20 A.R., 309 applied. Judgment of Street, J., reversed.

conditions subsequent. The learned judge says that he thought the defendants ought to have availed themselves of their election to forfeit on the non-payment of the first note. He says :

“There is no evidence here of any such election on the part of the company. They seek to set up an alleged arrangement made between their local agent Adams and the assured by which it was said to have been agreed that the assured should give up the policy in exchange for his notes, and that he should pay a small sum towards the expenses incurred by the company in connection with his application. I should, however, come to the conclusion upon the evidence that no such arrangement was definitely made ; it is said to have been made before the notes matured ; if so, why was it not carried out ? There was nothing to prevent it ; Adams had the notes, and the assured had the policy within a few feet of him in the safe of the Express Company, in whose office he was employed, and at whose counters one of the interviews took place a few days before the death of the assured.”

The assured was accidentally killed on the 19th July.

On the 22nd July, Mr. Reid, the payee of the notes and the cashier for the defendants at Toronto, and who states himself as having charge of the collection of premiums in Ontario, on hearing, writes to Adams, a local agent at Brantford.

JULY 22nd, 1889.

“DEAR SIR,—Yours of the 20th containing the return of the following receipts to hand, for which accept thanks. I am sorry you were compelled to return so many. Can you do anything with the notes if I send them to you ? I am sorry I sent you telegram by the Dominion, but was ignorant at the time as to which company’s messenger Cox was. Poor fellow ! he had a quick and sudden call. This shows the advantage of having life insurance.”

It was admitted that due notice of death and proofs were furnished and that the amount of the two notes was tendered to defendants before action was brought and refused by them.

This case is very distinguishable from the McGeachie case⁴ and also from Gordon v. Manufacturers’ Company, lately in this court.

In those it was held that when life dropped there was no existing contract as to payment of premium which was in default.

Here we have the peculiarity that there was a current obliga-

tion not matured on a note which defendants had taken in lieu of the first year's premium. It is true that the first note had, as part of its contract, the clause that if not paid at maturity the policy would be avoided. This would of course be at the option of the company to act upon or not. They bargain that even if the policy were avoided they might still collect the note.

The insurance companies that allow their agents to deal in this very loose and unbusinesslike manner with the payment of premiums, will always have difficulties of this kind to contend with. They issue policies based on the acknowledged payment of the first premium and instead of requiring such payment as a condition to the inception of the risk, they allow a system of accepting notes payable at various times, instead of the cash. They urge that this is done in case of insurers giving them time to make up the amount. It may be so, but it is the usual foundation for an action when the life unexpectedly drops.

I think the notes here taken must be considered as representing the premium, and, so long as one or more of them be current on the dropping of the life, I think they must be held to be liable, that a binding contract is in existence between them and the insured.

If the dishonor of the first note necessarily avoids the policy, why should the second note bind the maker to pay? There would be no consideration for payment except on the ground that the giving the second note was to support the risk up to the dishonour of the first note.

I cannot hold here that the fact of the first note for part of the premium being dishonoured, necessarily avoids the whole contract under the circumstances in evidence in this case. It is declared to remain a binding contract for payment—so far as to the first note. In the McGeachie case there was no existing contract of any kind in force at the death. I do not desire to go beyond the principle there laid down, or to apply it to this claim, and I therefore hold them still bound by the insurance.

Three days after the death, Mr. Reid, the payee of the notes, notices the death, and adds significantly that his sudden call was an instance of the benefit of life insurance.

If, as now insisted, the insurance was at an end, the significance of this moralizing is much weakened in point and application.

The defendants are protected from loss and reimbursed the

cash amount of the first year's premium, which ought to have been paid when policy was issued, by having the amount credited in the judgment against them. My learned brothers differ from me, and I candidly admit that I arrive at this conclusion with very considerable doubt and hesitation.

BURTON, J. A. :

This case differs from the cases we have recently decided, inasmuch as we have before us the rather novel innovation of a policy without any conditions. I do not think, however, that that circumstance can affect the result, and that we must hold that the policy had ceased to be in force before the death of the assured.

The policy professes to be in consideration of the representations contained in the application and of the annual sum of \$34.45 to be paid on the 1st day of April in each year, commencing on the 1st of April, 1889, a day then passed. This, however, is explained by the fact that accompanying the application was an agreement, inaccurately referred to as a promissory note, agreeing to pay to one Reid, an agent of the company, or his order, the said first premium by two equal instalments, one on the 29th June, the other on the 27th September.

The company, when accepting the risk, agreed to accept the first premium on these terms. The policy thus took effect as a binding contract, and the question is, whether it was terminated before the death of the assured.

But the agreement in question contained a provision signed by the applicant to the effect that if the said instalments should not be paid on those days respectively, the policy should be null and void, but that the said sums should nevertheless each be paid.

Although it is usual to exact the first premium in advance, it is by no means unusual to extend the time for its payment and to receive it in half yearly or quarterly instalments. It is true that in most policies there is an express condition that the policy shall be void in the event of default in the payment of any instalment, but I apprehend such a condition is wholly unnecessary, the punctual payment of every part of the premium being a condition precedent to the liability of the company. Punctuality in payment is of the very essence of the business of life assurance ; if, therefore, any of the quarterly instalments remain unpaid, the forfeiture is absolute, unless there is something in the contract itself to dispense with it. When no such stipulation exists it is the well-

established understanding that time is material, or as it is sometimes expressed, of the essence, or, as it has been ably expressed in other words by an eminent judge, thus: "An essential feature of this scheme is the mathematical calculations on which the premiums and amounts assured are based, not the relation between the annual premiums and the risk of assurance for that year." It is an entire contract for assurance for life (or, as in this case, for a period of 25 years), and as he expresses it: "The annual premiums are an annuity the present value of which is calculated to correspond with the present value of the amount insured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance."

I take it to be clear therefore, that without any express forfeiture clause, if this premium, by the terms of the policy, had been payable by quarterly instalments, a default in the payment of any of them even for a day, would have released the company from payment, and no court could relieve against it.

In the present case the applicant delivered to the company this agreement which they accepted consenting to postpone the payment but on the express condition that if not punctually paid in terms of that agreement it should be no payment. Why should that part of the agreement which bound the company be held to be binding, if not the rest?

It is to my mind a confusion of terms to speak of a forfeiture in this connection. The policy was to cease to be binding if the premium was not paid, it has not been paid—or which is the same thing an instalment has not been paid.

Nothing turns upon the alleged agreement referred to in the judgment of the learned trial judge as to the cancellation of the policy: if necessary to consider that point I should have agreed with him that it was never completed. I am, however, very clearly of opinion that default having been made in payment of an instalment of the premium as agreed to, the policy had ceased to be binding before the death of the assured.

The learned judge followed the decision in the Queen's Bench which has since the judgment been reversed in this court. I think for the reasons we have given we must grant the appeal and dismiss the action.

OSLER, J. A. :

The policy in this case is a policy without conditions as that expression is generally understood in reference to an insurance contract. There is no condition, stipulation, or proviso, either in the body of the policy or referred to therein expressly avoiding it if the premiums are not paid at the day named or if a note taken for the premium is not paid when due, nor indeed is anything said therein as to the case of a note being taken for the premium. This distinguishes it in this respect from the McGeachie and Gordon cases recently before us. Upon the true construction of the terms of the policy I am of opinion that it is made a condition of its coming into existence as a binding contract with the applicant and of its continuance as such that the first and successive premiums shall, as to the first, be paid before it comes into force, and as to the latter, shall be paid at the day stipulated for payment in each successive year. We are concerned only with the first premium. Its payment is not admitted or acknowledged on the face of the policy, which though delivered to the applicant was so delivered with a notice endorsed thereon that it was not binding until the first premium was paid. The company may so deal with the applicant as to show that the risk was intended to commence before the actual payment of the first premium. They may give credit for it, or accept a note for it, or other undertaking, payable at a future time, either in satisfaction of the premium or as an extension of the time for payment. In the case at the Bar I think the evidence supports the finding of the trial judge that the company accepted as payment of the first premium the two agreements (notes as they have been called, though they are not really notes, being payable only on condition of the acceptance of the proposal by the issue of the policy) bearing date the 28th March, 1889, one for the payment of half the premium at the expiration of 90 days and the other for payment of the balance at 180 days after date. Looking at the fact that the receipt for the premium was withheld I should myself have been disposed to hold that there was nothing more than an extension of time. But it seems to me that it makes no difference in point of law how the transaction is looked at. Either way the company had come upon the risk and unless there be some stipulation or condition avoiding the policy for non-payment of the sum according to the terms of the instrument representing the premium as there was in the policies in question

in the recent cases above referred to, the remedy for the company is confined to the securities they have accepted, they having waived their right to payment in cash. These instruments each contain the following stipulation "And it is understood and agreed that if this note is not paid at maturity the policy shall be null and void but this note is nevertheless to be paid." The first "note" fell due on the 29th June, but was not paid, and it remained unpaid at the death viz. :—on the 19th July. The case turns entirely upon the effect to be given this agreement and whatever difficulty there is in its application arises from the fact of its not being found in the policy itself as it was in the McGeachie and Gordon cases and in *Thompson vs. Knickerboker Ins. Co.* 5 Big. Ins. Cas. 8.104 (*Otto*) U.S. 252 : *Mutual Benefit Co. vs. French*, 4 Big. Ins. Cas. 369, and in appeal 30 Ohio St. 240. But can that make a real difference? The agreement is a collateral one, it is true, but is founded on a valuable consideration and it is binding upon and enforceable against the plaintiff. He is compelled to resort to it in order to show that the premium was paid and that the policy was in force and the defendants are in my opinion entitled to say that if it was paid it was so only on the terms and subject to the provisions of the agreement. I think the effect of the agreement is that if the payment is not made as stipulated for, the policy ceases to be in force unless the plaintiff is able to show that the defendants have waived the default and elected to keep the policy on foot. There is here no evidence whatever to justify such a finding in favor of the plaintiff. In the Court below the case was rested on the ground, following the decision of the Queen's Bench Division in the McGeachie case, that the company was bound to prove that they had elected in the life time of the deceased to avoid the policy but that decision has now been reversed in this Court, and the judgment reversing it governs the present case.

If, as I hold, the agreement of the 28th March, 1889, controls or regulates the right of the plaintiff when default has been made in payment according to its terms, I cannot agree that any duty was laid upon the defendants to present the note for payment when due.

It was for the insured to seek out his creditors and pay them and the consequences of his default in doing so were by the terms of the agreement defined. They were no more bound to present the note to him for payment in order to avail themselves of the

agreement than they would be to demand payment of subsequently accruing premiums before they could treat the policy as avoided by their non-payment, supposing that the policy had contained the usual condition to that effect. The case of *French vs. Mutual Benefit Life Insurance Company* 4 Big. Insurance Cas. 369 was relied upon by the respondent. That case was affirmed on appeal in 30 Ohio St., R. 240, but the appellate Court pointedly refrained from adopting the opinion of the Court below on that point, viz., that a demand of payment was necessary. I can see no analogy between such a case as this and that of a proviso for forfeiture of a term for non-payment of rent where at common law the landlord was obliged to make the demand of the tenant on the land in order to avail himself of the proviso. The case of rent was peculiar and the rule did not extend to forfeitures for breaches or other covenants in the lease.

I refer also to *Roehner vs. Knickerbocker*, 4 Daly 512, 63 N. Y., 160 : *Pendelton vs. Same*, 112 United States, 696.

I am unable to see how the fact of the time for the payment of the other half of the premium under the second agreement had not arrived at the date of the death can make a difference. The question is what is the effect of default having been made in the first. If the agreement in the first is valid, the existence of the other can hardly control it. The case appears to me to be precisely the same as if there had been but one note or agreement payable by two instalments with a clause of forfeiture of non-payment of either.

I agree in allowing the appeal.

McLENNAN, J. A.

The policy sued upon in this case is an instrument under seal dated the 9th of April, 1889, and contains no special conditions either in the body of it or incorporated by endorsement. Appended to it are a number of paragraphs called privileges and endorsed thereon is a notice, but these things form no part of the contract. The policy insures the life of F. D. Cox in the sum of \$1,000, and binds the company to pay that sum to the assured or to his assigns on the 1st of April, 1914, or, if he should die before that date to his legal representatives within sixty days after the receipt of notice and proof of the death. This obligation is expressed to be in consideration, among other things, of the sum of \$34.58 to be to the company duly paid on the 1st of April, 1889, as a premium for

12 calendar months, and of the payment of a like amount on the first day of April next, and yearly thereafter on the same date in every year during the continuance of the policy or until 25 full premiums shall have been paid.

The first question that arises is the construction of the policy. It is a covenant to pay money at the end of 25 years or within sixty days after the date of death of the covenantee in consideration of \$34.53 to be paid on the 1st of April, 1889, as the premium for 12 calendar months, etc., and it is a unilateral covenant contained in a deed without any obligation on the covenantee to pay the premiums. It is clear therefore that the payment of the premiums, which are the consideration for the defendant's covenant, is a condition precedent and the plaintiff cannot recover without averring and proving that the payments were duly made or some sufficient legal excuse for the omission : *Pordage vs. Cole*, 1 Wms. Saunders 551, 552 : *Leake on the contracts*, 564-5. One of the rules of our construction in such cases is that "when a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance." It is true that in this case the day named for the first payment is the first of April, while the covenant is dated the ninth day of April and therefore strict compliance with the exact language of the policy was impossible. To make the language sensible the word "first" must be rejected and then the payment would be to be made in the month of April. The words are "to be duly paid" indicating not a payment which had already been made, but one which was to be made in the future.

Therefore to entitle the plaintiff to succeed, he must prove payment of the sum of \$34.53 or something equivalent to it, at latest before the end of the month of April, 1889. It is admitted that the actual money was not paid, and what the plaintiff does is to show that before the policy issued the company received in lieu of payment the two papers called notes, dated the 28th of March, 1889. The question then arises what is the effect of that. These papers at first sight look like promissory notes and perhaps were intended to be such, but the promise to pay being conditional upon the acceptance by the company of the proposal for insurance, it is clear that they are not negotiable promissory notes, but were agreements between the assured and the agent of the company,

Mr. Reid. The plaintiff's case is that the company accepted these agreements in lieu of payment of the first premium and the evidence shows that they did so. They are instruments expressed to be for valuable consideration and the company having accepted them and having delivered the policy they became binding as agreements, collateral to the policy. The effect was that the risk upon the policy attached: the company gave the assured an extension of time for payment and the latter became bound to pay the premium at the time mentioned in the agreements. Each agreement, however, contained a provision that if payment was not made at maturity the policy would be void. Unfortunately the assured did not pay the first sum at maturity, and he was in default at the time of his death on the 19th of July. Without the agreement the plaintiff has no case and he cannot rely upon it without being bound by all its terms, one of which in the events which have happened is fatal to him. I think he cannot be heard to say that the policy did not cease to operate or that the company's liability did not cease by reason of the non-payment of the first note when it became due on the 26th of June.

I do not think it was necessary for the company to make any election whether they would treat the policy as subsisting or otherwise after default. By the very terms of the agreement the extension of time for payment of the premium was limited and when that time had expired without payment being made the assured was in the position of a person who had not paid the premium called for by the policy and who had not performed the condition precedent to the company's liability. Nor am I able, with great respect, to adopt the opinion of the learned Chief Justice that it makes any difference that at the time of the death the second agreement was still correct. It is like the case of a note payable by instalments and default made in the first payment. I see no reason why the parties should not have agreed, as they did here, that the liability of the company should come to an end on default in paying the first note or any instalment, or why they should not be bound accordingly. The company was, in my opinion, under risk until the first payment became due, and if that had been paid the risk would have continued until the day appointed for the second payment and its continuance after that would have depended on whether it was paid or not.

For these reasons I think the company's liability came to an

end on the twenty-sixth day of June, and that the action should have been dismissed.

I therefore think with great respect that the appeal should be allowed.

This decision was confirmed by the Supreme Court of Canada.¹

80. Payment of Premiums, etc.—The following judgment of Meredith, C.J., in *Fleming v. The London and Lancashire Insurance Company*² was rendered on the 11th March, 1896.

MEREDITH, C.J. :

Action tried before me without a jury on the 27th January last at the Toronto Assizes. The action is brought to recover the amount of two policies of insurance of the defendants on the life of James Fleming, dated the 4th December, 1894, for \$5,000 each.

The applications for the insurance were made by Fleming on the 19th of November, 1894, to W. H. White, who was the defendants' general agent for the district of Toronto and vicinity, and the premium payable in respect of each of them was \$105.80, fifty-five per cent. of which the agent was, under the terms of his agreement with the defendants of the 2nd August, 1892, entitled to as his commission for obtaining the risks. The applications were forwarded in due course by the general agent to the head office of the defendants at Montreal, and were considered and accepted on the 4th of December, 1894, and on the following day interim acceptance receipts, on the defendants' usual form, were forwarded to White, accompanied by a letter of the same date (Exhibit 9), in which he was informed that his account had been debited with the amount of them and of another receipt relating to another insurance which was sent to him at the same time. By the terms of the agreement between the defendants (Exhibit 6) and White, he was not, "under any circumstance," to "collect or receive payment of any premium without giving the head office receipt or policy therefor," and it was provided that all premiums should be paid in cash or notes approved by the defendants, and that the agent should not receive payment for premiums or renewals thereof in any other manner. White was furnished by the defendants with forms of receipts, which, from their terms, would appear to have been intended to be given to applicants for insurance who

¹ 23 S. C. R., p. 152, note.

² See Report of Supt. of Ins., 1895, p. xlv.

desired to pay their first premium by note, or partly by note and partly in cash.

The following is one of these forms put in on the trial (Exhibit 17) :

No. 4420. (In duplicate.) Note payable.....
London and Lancashire Life Assurance Company.

Agent's interim receipt.

Received from....., Esq., of....., his promissory note for.....dollars (on which the sum of.....dollars has been credited) being for the.....premium for an assurance of \$.....on the life of....., provided the application be accepted by the company, and if accepted, I agree to deliver the official acceptance receipt from the head office of the company in Montreal; or, should the said application be declined, I undertake to return to....., Esq., or to his order, the said promissory note. It is hereby understood and agreed that if the note be not paid at maturity, the policy or official receipt shall be null and void, but nevertheless the note shall be paid in full.

.....,
Agent.

Date.....

Place, Toronto.

White had given to Fleming two receipts, dated 19th November, 1894, for promissory notes for the amounts of the premiums payable by the latter; the receipts were upon the form I have just referred to, except that all the words in it commencing with the words: "It is hereby understood" down to the end of the receipt were stricken out, and the words "within fifteen days" interlined. One of these promissory notes made by Fleming, the insured, was dated the 19th November, 1894, and was payable to the order of White six months after date, and the other made by Robert Fleming, a brother of the insured, was dated the 10th December, 1894, and was payable in like manner, three months after date. White did not communicate to the defendants the fact that he had taken these promissory notes, or inform them how he had arranged with Fleming for payment of the premiums, but on 31st December, 1894, he telegraphed the defendants as follows: "Mailed my note one thirty-five 16 for premiums Fleming, McGlade, Thomson," and on the same day he wrote the defend-

ants as follows: "I omitted to inclose settlement of new premiums, hence I wired you to-day as follows: 'Mailed my note \$135.16 for premiums Fleming, McGlade, Thomson,' which I inclose herein." The amount mentioned in the telegram and letter was made up of the premiums on the two insurances in question and those of McGlade and Thomson, after deducting the agent's commission of 55 per cent. On the 3rd January, 1895, the manager at the head office wrote to White acknowledging the receipt of his letter of the 31st December in these terms: "I am in receipt of your letter of 31st ult., enclosing note at three months for \$135.16, which we will hold as requested." According to the evidence of the manager, the policies in question were included in the defendants' return to the insurance department, and it must therefore have represented the promissory note of White as an asset of the defendants, and the policies as "outstanding policies in force." At this time, according also to the evidence of the manager, he assumed that White had received the premiums in cash. It did not appear in evidence when the interim acceptance receipts were handed by White to Fleming, but they were produced by the plaintiff, and are countersigned by White—his countersigning being, according to a note at the foot of the receipts, necessary to their validity. White, after receiving the promissory notes, but at what time was not disclosed in evidence, discounted them with Burke & Graham, a firm of private bankers in Toronto, receiving the amounts of them, less the discount, and endorsing them to Burke & Graham. It is important at this point to note that at the date when White forwarded his own promissory note to the defendants, he had possessed himself, by means of the discount, of Fleming's promissory notes, and had in hand far more money than would have been sufficient to pay to the defendants that part of the premiums to which they were entitled. On the 22nd January, 1895, White wrote to the defendants asking them to forward, among others, the policies in question, and they were accordingly forwarded to him on the following day, with a letter which informed him that he had been debited with the premiums in respect of them. The promissory note of the 10th December, 1894, was renewed in full on the 21st March, 1895, by a new promissory note at two months, and on the 5th June, 1895, the other promissory note of the 19th November was renewed for \$100.80, \$5 being paid in cash to White, who gave a re-

ceipt for the note and cash as having been received "to retire James Fleming's note for \$105.80, due May 22nd, 1856;" but on this latter note being taken to Burke & Graham they refused to renew, and retained the note of the 19th November, 1894, in their own hands overdue. The promissory note of the 21st March, 1895, was not paid at maturity, and it, with the note of the 19th November, 1894, remained overdue and unpaid in Burke & Graham's hands until some time in July, when, in order that the defendants might be in a position to say that they held the notes as past due notes, they were taken up by White with moneys furnished to him by the defendants, to whom they were handed over. Fleming was at this time dead, his death having taken place on the previous 15th June. Upon this state of facts the defendants contend that the policies were never binding on them at all, because, as they say, White neither received the cash nor promissory notes approved of by them for the premiums, and that even if the promissory notes taken by him, or White's own note, are to be treated as notes given for the insurance premiums, or even if the latter was accepted in satisfaction and discharge of the premiums, the conditions indorsed in the policies prevent the plaintiff recovering, the policies having, as they contend, become void in consequence of the notes not having been paid at maturity, and they invoke in support of this contention, condition one, which provides that policies shall not be in force until the first premium is paid, and condition 10, which is as follows: "If a note or other obligation be taken for the first or renewal premium, or any part thereof, and such note or obligation be not paid when due, the policy or assurance becomes null and void at and from default, but such avoidance of the policy or assurance shall not relieve the maker thereof from payment of the note or obligation, and the premium shall be considered as earned and shall be recoverable by the company. The policy or assurance, however, may be revived and reinstated at the discretion of the directors on condition of payment of the premium and interest and evidence of continued good health. Should any note or other obligation for premium be current at death, or other event, upon which the sum assured becomes payable, the amount of the note or obligation shall be deducted from the claim." And they further contend that the renewal of the promissory note of the 19th November, 1894, after it was overdue, was an unauthorized act of the agent, and not binding on them,

and that after default the directors, and they only, could revive or reinstate the policy. It was urged on behalf of the plaintiff that the effect of the transmission between White and Fleming was that there was a payment in cash of the premiums, and that even if that be not so, the defendants accepted White's promissory note for \$135.16 in payment of the portion of the premiums to which they were entitled, and that the condition relied on has no application to a case where the promissory note of a third person is accepted in satisfaction of the premium. The case is by no means free from difficulty, but I have, after much consideration, come to the conclusion that the plaintiff is entitled to succeed. There is nothing, so far as I can see, to prevent a company, such as the defendant company is, accepting in satisfaction and discharge of a first or any other premium, the note of a third person, if the company chooses to do so, and it seems to me that to a promissory note so taken condition 10 can have no application. It would be indeed an anomaly if, after payment by such promissory note, and the premium being thereby satisfied and discharged, the default of the maker of the note in paying it should void the policy and render the insured also liable to pay the premiums in satisfaction of which it had been accepted. The condition is, in my opinion, not applicable to such a case, but to cases where the promissory note is taken, not in satisfaction and discharge of the premium, but for and on account of it, where it would operate only as a conditional payment to be absolute if and when the note was paid at maturity. If this be the correct view as to the law, what is the proper finding of fact as to the way in which White's promissory note was received by the defendants. It is, I think, that the note was taken in satisfaction and discharge of the premiums. As I have pointed out. White had the proceeds of the promissory notes given by the Flemings in his hands, though he was liable to Burke & Graham as indorsers on them—the notes were not taken by him on the defendants' account, but were taken and dealt with as a transaction between him and the insured, and for the purpose, as I think the fair inference is, of enabling him to pay to the defendants in cash the share of the premiums to which they were entitled, and to give to him the present use of his own share of them, and White, I think, when he sent his letter and telegram of the 31st December, 1894, to the defendants, intended that they should take, and they in receiving his promissory note intended to take and took it in

satisfaction and discharge of the premiums due to them in respect of the policies to which they had reference. In reaching this conclusion I rely on the language used in the correspondence read in connection with what had taken place, and the manner in which the defendants afterwards treated and dealt with the policies, rather than the recollection of White and Brown (the manager) as to what the true character of the transaction was. The provisions of the bond given by White and his sureties to the defendants in 1891 are not without significance. In addition to the provisions contained in the printed form used, which I take to be the ordinary ones, I find a special provision in these words: "It is understood and agreed that this bond will cover payment of any and all notes made by W. H. White that the company may accept from the said W. H. White for premiums under policies effected by him as well and effectually as if no such note or notes were taken." It may be well, I think, that the arrangement made between White and Brown (the manager), to which the latter referred in his evidence, was that to which this term of the bond refers, and it was probably in pursuance of it that White assumed the right to send as he did his own promissory note in settlement of the premiums. I am inclined to think also that the transactions between White and the insured amounted, when the proceeds of the promissory notes which he received from him came into White's hands, to a payment in cash of the premiums, and the plaintiff's right to recover may be supported on that ground also. The defendants' counsel cited the case of *McCormac v. The Temperance and General Insurance Company*, which he contended was a conclusive authority in favor of the defendants, but I am unable to agree to that view, and the language of the learned Chief Justice (Armour) seems to me to indicate that in his opinion, on a state of facts similar to that which exists in this case, a conclusion ought to be come to different from that which was arrived at in that case. He says: "The liability of the agent to pay the defendants the amount of the note of the insured could not be substituted for the liability of the insured to pay it by the act of the agent without the consent of the defendants." Upon the whole the plaintiff is, in my opinion, entitled to judgment for the full amount of the policies, with interest from the date of the receipt by the defendants of the proof of death, together with her costs of suit.

The judgment was confirmed in appeal, the court being

equally divided, and an appeal is now pending to the Privy Council.

30a. Notes for premiums unpaid, etc.—Powers of Secretary in Canada of foreign company.—J. M. was insured by a life policy, under which 30 days grace was allowed for payment of premium, and a lapsed policy might be renewed within a year upon proof of health, payment of arrears and a fine. S. was the resident secretary in Canada of the defendant, with the powers of a general manager, and there was a local board of directors in Canada, but S. managed all matter connected with the receipt of premium, communicated directly with the board in England, took his instructions from them and laid before them monthly accounts from which it could be ascertained whether premiums falling due the preceding month were unpaid. The assured being unable to pay a premium about to fall due, wrote to S. asking him to take a note at three months. S. replied: "I am sorry you require three months' time, but I suppose it must be done, although it is against our rules. I shall have to take responsibility myself. I enclose a draft for acceptance, which please return early." He also wrote that the company were very particular about overdue premiums. From this time S. accommodated the assured by taking notes, to which interest was added. On the 9th of August, 1879, E., the cashier of defendant, wrote to the assured, acknowledging receipt of his letter with a blank note which had been sent to S. to be filled up for the renewal of a note about to fall due, and saying that S. was absent from town, and that as the two premiums of November, 1878, and May, 1879, were so long overdue he should have to refer the matter to S. on his return, adding: "Until these back premiums are paid the society is off the risk." The death occurred on the 29th October, 1879, at which time there were two notes outstanding—one for the premium due 30th November, 1878, dated 7th February, and due 10th August, 1879, which was unpaid; and one dated 21st June, 1879, at six months, for the premium which fell due on the 30th May, 1879, which was still current. After the death these two notes were tendered to the defendants and refused. S., being examined, said he did his best to keep the policies alive, and had no doubt at the time of his authority to do so. The jury found that the notes were taken by the defendants' agent as cash payment; that the taking of them was within his authority; and that he had waived payment upon

the date the premium was due; and a verdict was entered for plaintiff: Held (Hagarty, C. J. dissenting) that the evidence showed that it was within the authority of the resident secretary to accept notes in payment of premiums, and there was nothing showing notice to the assured of any want of such authority; that the non-payment of the note in August, 1879, while the other note was current, did not determine the policy; and the verdict ought not to be disturbed. Per Armour, J.: Defendants in England had become aware by the returns sent by S. of the forbearance granted by him and had ratified it. Per Hagarty, C. J.: Admitting that S. might accept payment after the proper time, he could not make a binding executory agreement to give further time and extending perhaps beyond the duration of life.¹

81. Note for premiums unpaid—Declaration by company to work forfeiture.—By a policy of insurance dated 13th April, 1869, for the payment of the annual premium of \$29.56 payable quarterly, the defendants jointly assured the lives of the plaintiff and his wife in \$1,000, and engaged to pay the same on the death of the assured when the event provided for happened, deducting therefrom all notes for premiums on the policy unpaid at that time, together with any balance of the year's premium remaining unpaid. And in case the assured should not pay the said premiums on or before the said several days etc., and the interest on all notes on account of premiums until the same were paid, the company should not be liable for any sum, with the exception that in case this policy is allowed to lapse, after one full annual payment has been made, the insurance will be continued in full for the period which the equitable value of the policy at the time of lapse would purchase." Payments of premiums were made in cash from the 13th April, 1869, to, but not including 13th January, 1874, upon which day the policy lapsed, being for four years and three-fourths of a year, which, by the company's tables under the equitable and non-forfeiting system extended the policy after the lapse for a period beyond the 2nd January, 1877, when the plaintiff's wife died. It appeared that on the 28th January, 1875, the plaintiff gave defendant's agent a so-called promissory note for the four instalments due in 1874, being up to but not including 13th January, 1875, which note was payable in three

¹ *Moffatt v. Reliance Mut. Life Ass. Soc.*, 45 Q. B. 561, Q. B. D.

months, and provided that if not paid at maturity with interest at seven per cent, the policy should be null and void. It also appeared that on the 8th April, 1875, during the currency of the note plaintiff paid, and the company received payments in cash of the premiums which fell due on the 13th January, 1775. In an action by the plaintiff to recover the amount of the policy :—Held that he was entitled to recover ; that by the cash payments made up to the 13th January, 1874 there was a right to the benefits of the policy for such extended period, that it could not be deemed to be the intention of the parties to abridge such rights by the note of the 28th January, 1875, but that the effect of non-payment thereof was merely to put the parties in the same position as if the note had not been given. Per Gault J.—To work a forfeiture for the non-payment of a promissory note as the one in this case, the company must demand payment of it on the day it became due, and, if not paid, declare the policy forfeited or void. *Semle*, per Wilson, C. J., the company, by receiving the premium in cash for a period subsequent to that for which the forfeiture was claimed, had waived such forfeiture, though the receipt was before the forfeiture had accrued.¹

82. Cheque for premium unpaid.—By a policy of insurance upon the life of J. N., it was stipulated that if any premium should not be paid when due, the consideration of the contract should be deemed to have failed, and the company released from liability ; by another clause, if an overdue premium was received it was to be upon the express condition that the assured was in good health, etc., and if the fact were otherwise, the policy should not be put in force by such receipt. A cheque was given for a quarterly premium, with the request to hold it for a few days, as there were not then funds, which was received by the agent, but the premium receipt was not given up. It was afterwards presented but not accepted. On the 21st October funds were provided, but it being then after banking hours the cheque was not presented. That night J. N. was killed. Held, affirming the decision of the Court below, that the policy lapsed the day after the premium fell due ; that nothing but payment could then revive the policy, and that there was not any evidence of payment, or of anything dispensing with it.²

¹ *Watts v. Atlantic Mut. Life Ins. Co.*, 31 C. P. 53 C. P. D.

² *Neill v. Union Mutual Life Ins. Co.*, 7 A. R. 171.

83. Action on premium note—When insured must accept.—

An insured having given his promissory notes for the premium upon an insurance, refused to pay them upon the grounds which will appear by the statement of facts which appeared upon an action brought against him by the company upon those notes as follows: The applicant for insurance and the company entered into an agreement for the insurance against fire and lightning of several articles of property. The application for insurance was drawn up by an agent of the company and signed by the applicant; but through a mutual mistake of the parties, some of the articles to be insured were omitted. Through a like mistake, the amount of these notes which the applicant gave for the insurance were made sufficient only to pay for the insurance of the articles actually included in the application and not sufficient to pay for the insurance of all the articles. Afterwards an insurance policy was issued in exact accordance with the terms of the application, and several weeks thereafter it was tendered to the applicant, who refused to receive the same on the ground that the articles omitted in the application were omitted from the policy. The agent offered to issue a new and separate policy for those omitted articles or to insert them in the policy already issued; but the applicant refused and the agent retained the policy. The applicant never demanded or asked for a return of his notes, or for a rescission of the contract. The right of the company after these notes became due to recover upon them was upheld by the Supreme Court of Kansas. The Court said: "The maker of these notes had the benefit of the insurance of all his property which he desired to have insured, including the omitted property, for several weeks before the mistake was discovered and therefore could have recovered for any loss from fire or lightning which might have occurred during those several weeks. And as he never asked to have the contract rescinded, and as it never was in fact rescinded, he really continued to have the benefit of such insurance, and could have recovered for any such loss which might have occurred at any time, either before or after the discovery of the mistake. Before any loss occurred he could, by a suit in equity, have had the policy reformed so as to make it include the omitted property; and after loss, if any had occurred, he could, according to the authorities,¹ have had the policy reformed, if it needed any reformation, and

¹ 11 Am. & Eng. Enc. of Law 346; Wood on Fire Ins. § 479.

have recovered for his loss in the same action. It follows that the notes were not given without consideration, and that no failure of consideration existed in the case.¹

84. Note in payment of premium given to agent.—In a case very recently decided by the Supreme Court of California the custom of giving a note in payment of a premium upon a policy of life insurance was discussed. The original action was brought by one *Jurgens* against the *New York Life Insurance Company* to recover \$1,462 paid as first annual premium upon a policy of life insurance for \$25,000. The plaintiff claimed that he had been induced to receive the policy and pay the first premium by misrepresentations of a solicitor of the company. The alleged false representations were examined into, but the decision turned on the point as to whether a note given to an agent in payment of a premium constituted a breach of the stipulation that the policy to be issued should not be in force until the premium was actually paid to the agent of the company and by him accepted. In this case the insured gave his note to the canvassing solicitor, by whom it was discounted, and the proceeds paid over to the company's general agent, by whom the policy was handed over to the maker of the note. It was pleaded that the contract was never in force, as the promissory note really amounted to nothing more than an extension of time for paying the premium, and the policy expressly stated it would not be recognized as being in force until the premium was paid. The Court declined to accept this view. The decision in the case of *Griffith vs. Insurance Co.* was quoted to this effect: "The issuance of a note was in effect, so far as defendant was concerned, a payment of the premium to the agents, who held the note in lieu of so much money with which they were chargeable. It was, as to defendant, a payment of the premium to the agents, and not an extension of the time of payment." In case under notice, the actual agent of the company did not know of the note when the policy was issued, and, as the canvassing solicitor had no authority to take a note, he was answerable to the company for so much cash. As there had been an unconditional delivery of the policy, the Supreme Court of California held that this constituted a waiver of the express condition in the policy that the company should not be liable until the premium is paid.²

¹ *Pierce v. Home Ins. Co. of New York* (1891) 45 Kan. 576.

² *Insurance and Finance Chronicle*, March 1, 1897.

85. Cases where premium is not due and must be returned.—In the following cases the premium is not due, and, if it has been paid, it may be recovered back, the contract being void :

1. When the risk insured against does not occur, for any causes, even those arising, without fraud, from the act of the insured.

2 When there is a want of insurable interest, or any other cause of nullity without fraud on the part of the insured. The insurer in these cases is entitled to one-half per cent. on the sum insured for his indemnification unless the policy is illegal, or rendered null by fraud, misrepresentation or concealment on his part. If the policy be illegal, there is no right of action for the premium and none to recover it back if it have been paid.¹

This applies when the risk occurs for part only of the value insured for the non-payment or return of a proportional part of the premium, according to circumstances and the discretion of the court.² The above applies in part to marine insurance only.

86. Life insurance—Action to recover premiums—Policy taken out by creditor in excess of amount due to him—Insured acted in good faith—Premium paid in excess of liability must be returned.—The judgment below dismissed the action, which was to obtain a return of premiums paid. It appeared that L. had insured the life of a man who owed him a sum of money, but instead of limiting the amount of insurance to what was owed him, he insured for a large amount, and paid considerable sums for premiums. He found that he could not keep this up, and besides, that the insurance would have to be limited to the amount of the debt. There were pour parlers ; the company offered to reduce the insurance but declined to pay back the amount of premium paid. The company pleaded that it insured the man for the \$10,000 and that the plaintiff must suffer the loss of the premiums, whether it was his fault or an error. The Code declared that a person could not effect an insurance for more than the amount of his interest. Held, that there was no fraud on the part of the insured, but good faith, the plaintiff was entitled to succeed in his

¹ C.C.L.C. 2501, 2469 ; Porter's Laws of Ins., 7 ; May, p. 5 § 5 ; 2 Va. h.t.a. 37, 38, p. 93, a. 41, p. 96 ; Poth. Ass. 179, 180, 182 ; 1 Em. 12 ; 2 *Ib.* c. 16, s. 1, p. 187 ; 2 Arn. c. 11, 1269, § 424 ; 1 Ph. 503, 514 ; 2 *Ib.* 353 ; Marsh. 464, 662, 663 ; 1 Alau. n. 179 ; Par. n. 872 ; 4 Bou. Pat. 1, 3, 114 ; 1 Arn. 349 ; C. Co. 349.

² C.C.L.C. 2502, Poth. Ass. 183 ; C. 2501.

See also *supra* § 19.

action for the recovery of what he had overpaid. The court referred to Boulay, Paty and Pothier. It was not proved that the company knew that Lapierre's claim was only \$600, but it received \$700 in premiums without being liable for the amount insured, as it could easily have pleaded that it was not liable for the excess over the \$600. Judgment reversed, and action maintained.¹

87. When applicant may recover the premium paid.—Where in the application it was agreed “that this application shall form a part of the contract of insurance, and that, if there be in any of the answers herein made any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void,” and the policy provided that “this policy is issued and accepted upon the following express conditions and agreements: That the answers, statements, representations, and declarations contained in, or indorsed upon, this application for this insurance—which application is hereby referred to, and made part of this contract, are warranted by the insured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation or concealment, that this policy shall be absolutely null and void.” It appeared that the answers made to the questions asked the applicant were made at the suggestion of the insurer's agent, and without a proper knowledge of their effect, and he paid the premium for the insurance.

When the insured became aware of the true state of the facts, he considering the policy void *ab initio* brought action to recover the premium which he had paid. The company contended that the provision as to the effect of warranties stated above was for their benefit, that it was optional with them to cancel the policy; that it took effect and was of force until cancelled, and that the premium was not, under the terms of contract recoverable from them. The trial court found as conclusions of fact that “several of the answers to questions contained in the application of the plaintiff on which the policy of insurance was issued were erroneously answered, and the court further found that the untruth of several of said answers was upon questions material to the risk, and that, by the terms of said policy and the application which

¹Lapierre and London & Lancashire Life Ins. Co., S. C. R., 1877. See also index for §§ *infra*.

became and was a part thereof, the untruth of said answers constituted breaches of warranties in respect thereof contained in said policy, and that by its terms the breach of said warranties was to make said policy null and void."

And the court found as a conclusion of law that the policy "is wholly void and of no effect whatever, and was so from the moment it was issued." In addition the court found "that all of the said questions so erroneously answered were answered by the plaintiff under an innocent misapprehension of the purport of the questions and the answers that should have been made thereto, and without any intent to perpetrate a fraud of any kind upon the insurer." There was a judgment therefore rendered in favor of the plaintiff for the premium he had paid on this policy. The Supreme Court of Ohio held that on this policy, on the facts as found, no risk ever attached, and affirmed the judgment of the court below.¹

88. Error as to premium.—Where an assurance on the life of a person is made for the sum of \$4,000, and in calculating the annual premium of that assurance the agent, through error of calculation, represents to the assured that the annual premium will be \$168.56, according to the ordinary rates of the company, and the assured accepts and consents to pay that premium, for which he gives notes for the first year, the company has no right thereafter to compel the assured to pay the premiums it ordinarily charges, even if it be proved that the assured knew the ordinary rates for a sum of \$1,000, and consent had been obtained through that mutual error; but the company in that case would only have the right to demand the annulment of the contract.²

89. Life insurance—Privity of contract—Difference in premium—Premium notes.—Action for \$225, amount of a promissory note. Plea, no consideration, and that the plaintiff had represented to defendant that he was an agent of the *Ætna Life Insurance Company* of Hartford, and as such induced plaintiff to take out a policy of insurance on his life for \$5,000, in consideration of the annual payment to said company of \$225, for which sum said note was made; that said note was not given to defendant personally, but to the company, and when the policy issued it was upon condition of defendant's paying the company an annual premium of

¹ *Ins. Co. v. Pyle*, (1836), 44 Ohio St., 19.

² *Christmas & Borduas*, 15 R. L. 534, S. C. 1885.

\$315; the defendant refused to accept said policy when the same was offered to him and returned it to the company, who accepted and still held the said policy; that no privity of contract respecting the note ever existed between plaintiff and defendant. Held that there was privity of contract between the agent and the maker of the note, and the note being given for good and valid consideration, the agent could maintain an action upon it.¹

90. Extra premium—Construction of.—In a recent decision, *G. H. Matthews v. William Henry*, of the Court of Review at Montreal, March 31st, 1896; the construction of the clause exacting extra premium in consequence of the special business or works carried on in leased premises by the lessee was discussed at length. Acting Chief Justice Tait remarked upon it as follows:

“This case calls for the interpretation of a clause regarding extra premium of insurance in a lease from the plaintiff to the defendant, of date the 21st day of July, 1893, for a term of ten years, commencing on the 1st May, 1894, of certain lots of land therein described, with a factory of brick, on stone foundation, not then built, but which the lessor obliged himself to construct on certain of the lots, according to certain plans and specifications approved of by the lessees, and to have the same completed, if possible, by the 1st November. Amongst other considerations, defendants agreed by clause 8 as follows: ‘To pay all extra premium of insurance that the company, with which the premises may be insured, shall exact in consequence of the business or works carried on therein by the lessees. ‘Any dispute arising out of this clause to be decided by the Board of Fire Underwriters in this city, the building, it being understood, being built as a factory.’ The defendant took possession of the premises on the 1st of May, 1894, and in November of that year, plaintiff brought the present action, wherein he stated that he had paid the sum of \$180 for extra premium of insurance, exacted over and above the premium demanded for the insurance of said building, in consequence of the business and works carried on in the premises by defendant, for the term of one year from the 1st day of May, 1894, and he prayed judgment for that amount. The defendant pleaded (1) that the insurance company with which the leased premises were insured had not exacted any premium of insurance from the plaintiff

¹ *Alexander & Taylor*, 25 L. C. J. 252, S. C. R., 1880.

within the meaning of said lease, and (2) that the premises were specially erected for the use of defendant, who is and was, when said lease was made, a laundryman and manufacturer, and said premises were intended to be used as a factory for the purpose of defendant's said business, and that they have been so used; and that under the custom in the city of Montreal, in such cases, and the true interpretation of said lease, 'he defendant is not liable, as alleged in plaintiff's declaration.

"The plaintiff answered the second plea by alleging that the amount sued for was paid by him in accordance with the terms of the lease, and represented the proportion of the total insurance payable by plaintiff, which was exacted by the insurance companies with whom plaintiff's building was insured, in consequence of the business being carried on by defendant. .

"The parties went to proof, and it was established that the leased premises were insured in the following insurance companies, namely, Guardian, \$5,000; Phoenix, \$5,000; Liverpool, London & Globe, \$2,500, and Northern, \$2,500. making in all \$15,000, at the actual rate of \$1.72½ per \$100. Of this the plaintiff claims he is only entitled to pay 52½c. per \$100, and that the balance, \$1.20 per \$100, is for the defendant to pay, according to the true meaning of the lease.

"It is proved that, if the building was vacant, or if it was occupied as a wholesale dry goods, or hardware store, or for any ordinary wholesale business, the rate would be 52½c. per \$100. Of course, it does not follow from this that every company would be willing to insure the premises if they were vacant, at that rate, but, nevertheless, that appears to be the ordinary rate that would be demanded if the building was vacant, and if it was occupied as a wholesale store, the rate would not be increased. This serves to show that certain businesses could be carried on in the building which would not entail the payment of extra insurance.

"Mr. Heaton, Insurance Manager, states that the \$1.72½ is made up in this way :

Basis for Standard Laundry, \$1.12½ per \$100 of insurance.

Extra for height of building, 10c. per \$100 of insurance.

Extra for position of stairs, 10c. per \$100 of insurance.

Extra for position of boilers, 15c. per \$100 of insurance.

Extra for having no night-watchman or watch clock, 10c. per \$100 of insurance.

Extra for additional occupancy, 15c. per \$100 of insurance.

Making the total rate charged \$1.72½ per \$100 of insurance.

"Mr. Hadrill, Secretary of the Fire Underwriters' Association, a witness for defendant, was asked to state the extra premium of insurance, in consequence of the business carried on, it being understood that the building was built for a factory. He replied that it was a difficult question to answer, for the reason that there are several classes of factories, that the best rate on most of these factories is \$1.02½. He says a great number of them are what are known as standard factories, and these secure this rate of \$1.02½ per \$100. He fixes the basis rate for a standard laundry at \$1.12½, and for a standard factory at \$1.02½, making a difference of 10c. per \$100. Mr. Evans, while admitting that these are the basis rates, states that the factory business rate varies, that there are 100 different classes in the tariff.

"Several witnesses say there is no factory basis.

"The plaintiff contends that everything is to be considered 'extra premium' over and above what is required to cover the building as a vacant building, or when used as a wholesale store, or, in fact, any business which does not involve extra premium, 'in consequence of the business or works carried on.' For this reason he pretends he is entitled to start from the basis of a wholesale store rate, and charge all over that rate to defendant.

"The defendant contends first, that he has nothing to pay, because plaintiff knew that he was going to carry on a steam laundry, and erected a building suitable for that business, and second, that if he has anything to pay, it is only the difference between the rate for a standard factory and that for a standard steam laundry, namely, 10 cents per \$100.

"The difficulty in interpreting the clause arises in a great measure from the neglect of the parties to state, in a clear way, from what basis they proposed to start in ascertaining what is to be regarded as 'extra premium.' Is it from the rate for a vacant building, or for a wholesale store, or for a factory, or what?

"There is nothing said in the lease which could lead to the conclusion that a wholesale store rate was to be a starting point. The building was not to be used for that purpose. On the contrary, the language of the lease, outside entirely of the clause in question, shows that the building was to be built and leased as a factory for defendant's use, for ten years, at any rate.

"It is described as 'a factory on a stone foundation.' The basement of the 'said factory' is to be of stone, etc.; the lessee agrees to assume the responsibility for any annoyance or damage which may be caused by the smoke coming from the chimney of 'said factory,' and is to comply in all respects with the requirements of the Factory Act, except Art. 3,025 of the R. S. of Q.

"All this shows clearly enough that plaintiff built and leased this building as a factory, and the parties having made this point so clear by the terms of the lease, apart from the clause in question, what was the object in stating in that clause, 'Any dispute arising out of this clause to be decided by the Board of Fire Underwriters in this city, the building, it being understood, being built as a factory,' unless the fact of the building having been built as a factory for defendant's use was to be taken into consideration by the Board in determining the amount of extra premium to be paid by defendant. Was it not intended as an instruction to the Board that they were to start from the basis of the building, used as a factory, in determining the extra insurance? What else could have been the object in putting in these words as to the building being built as a factory? It could not have been intended to refer merely to the character of the building, because it is described, as already shown, over and over again in other parts of the lease, as a factory. Finding them here in connection with the clause, we must give them some meaning.

"It seems to me that the intention of the parties was that, if the defendant carried on any business in the premises, which involved payment of extra premium, over the premium payable for a building occupied and used as a factory, the defendant would have to pay the extra premium exacted for such business.

"Taking this view, and giving plaintiff the benefit of the best rate, that is, the rate of a standard factory, namely \$1.02½, I think defendant has to refund him 10 cents per \$100, difference between such basis rate and \$1.12½ per \$100, basis for a standard steam laundry.

"Then, as to the other charges, of which the \$1.72½ is made up, I think those which depend upon the character of the building, and which are applicable to all factories, although the precise amount may vary, according to the construction of the building, should be borne by the plaintiff, as proprietor.

" Thus the charge of 10 cents for height and 10 cents for stairs, resulting directly from the construction of the building, which are applicable to every factory similarly constructed, should be borne by plaintiff. The charge for no night watchman or watch-clock, resulting from defendant's own neglect to provide one or the other, should be paid by him. The charge for additional occupancy, which, in the absence of proof to the contrary, we must presume to result from defendant sub-letting a part of the premises, must also be borne by him. As to the boiler, although it may, perhaps, be said that one is necessary in every factory, yet the proof shows that this particular boiler belongs to defendant, that he put it inside the building, and the charge is made on account of the peculiar position in which it is placed, that is to say, because it is not placed up in a standard position. I therefore think defendant should also bear this charge.

" To conclude, I think that defendant should refund the following amounts included in the \$1.72½, which plaintiff paid, namely :

10c. Difference between the two basis rates already mentioned.....	\$ 15 00
10c. No night watchman or watch clock.....	15 00
15c. Additional occupancy.....	22 50
15c. Position of boilers	22 50
Total	<hr/> \$ 75 00

" I would, therefore, reverse the judgment by reducing the condemnation to seventy-five dollars (\$75.00), with costs of an action for that amount in the Superior Court against defendant, and with costs of review against plaintiff."

Judgment reversed, Taschereau, J., dissenting.

91. Extra premium to be paid by lessee.—In a deed of lease there was a clause which stipulated "that the said lessee should pay all extra premiums of insurance that the company by which the premises now leased may be insured shall exact in consequence of the works or business done or carried on therein by the said lessee," and the lessor brought action for seven shillings and six pence per cent which they had been obliged to pay to the insurance company, and the defendant pleaded that the premium charged was the ordinary premium and no part thereof was extra premium within the meaning of the said clause. Held on the facts, that de-

fendant's pretensions were unfounded, and the action was maintained.¹

92. Place of contract.—In the case of *Clark v. Union Fire Insurance Company*² it was held that policies signed and sealed in Ontario and sent to an agent in New York who filled them up and issued them there, were Ontario contracts.

The United States decisions are, however, to the effect that the place of contract is the place of acceptance.³

93. Place of payment.—In the United States it is said that in the absence of special agreement the insured must seek out the insurer to pay.⁴

94. Notice of payment of premium.—A mere usage of giving notice of the day of payment of premium is insufficient as a waiver of prompt payment in default of such notice.⁵

95. Renewals.—A renewal is generally held to be a new contract⁶ on the terms and conditions stated in the policy expired. The old application, in the absence of evidence to the contrary, serves as the basis of the new contract and as if made at the date of the renewal.⁷ The rulings on parol agreements for original insurance would seem to apply to a parol agreement for renewal.

95a. Renewal—Stipulation : lost or not lost.—In the New Brunswick case of *Giffard v. Queen Insurance Company*,⁸ the plaintiff insured against fire in the L. & L. Co. from 2nd October, 1865, to 2nd October, 1866. Before the term expired he received a notice from their sub-agent that the insurers would renew, and accordingly he paid the premium to him on their account. The general agent of the company declined to renew and paid the premium to another company, the defendants, who issued a policy dated 16th October, 1866, but insuring from 2nd October, 1866, to 2nd October, 1867. The premises were destroyed by fire on the

¹ *Platt v. Keary et al.*, 7 L. C. J. 80, 1862.

² 6 Ont. Rep. 223. ³ See index for §§ *infra*.

⁴ *Kenyon v. Knights Temp. Ass.*, 122 N. Y. 247, 1890.

⁵ *Thompson v. Knickerbocker Co.*, 104 U. S. 252, 1831; *Smith v. Nat. Co.*, 103 Pa. St. 177, 1833, but see *contra* *Union Central Co. v. Pottker*, 33 Ohio St. 459, 1878; *Goedecke v. Metro. Co.*, 30 Mo. App. 601, 1888.

⁶ See index for § *infra*.

⁷ *Martin v. Home Ins. Co.*, 20 U. C. (C. P.) 447; May, p. 123.

⁸ 1 Hannay (New Brunswick)k, 432.

13th October before the policy was issued ; but the plaintiff did not know that he was insured by the defendants until he received the policy from the sub-agent, who also acted for the defendants. It was held that the transaction amounted to a reinsurance, and that the defendants insured the property "lost or not lost"—in other words, "burnt or not burnt"—from the 2nd October, 1866, to 2nd October, 1867.

96. Accident insurance tickets.—The tickets issued in some branches of accident insurance, sold and delivered by an agent and paid for, give the owner a valid claim against the company, subject to the conditions on the ticket.¹

¹ *Brown v. Ry. Pass. Ass. Co.*, 45 Mo. 221. As to decisions on agent's authority, warranties and usage, etc., reported in this chapter, see also index for §§ *infra*.

CHAPTER V.

INSURANCE UNDER INTERIM RECEIPT.

97. GENERAL REMARKS ON INTERIM RECEIPTS.

98. DEFINITION OF AN INTERIM RECEIPT.

99. LITIGATION CONCERNING INTERIM RECEIPTS.

100. INTERIM RECEIPT NOT ESTABLISHING PAYMENT OF PREMIUM.

101. WHEN MERE LAPSE OF INTERIM CONTRACT DOES NOT TERMINATE INSURANCE.

102. AGENT NEGLECTING TO FORWARD APPLICATION TO COMPANY—REPEATED ISSUE OF INTERIM RECEIPT—MERE LAPSE NOT VOIDING INSURANCE—INTIMATION TO TERMINATE RISK MUST BE GIVEN—INTERIM RECEIPT BINDS BOTH PARTIES.

103. RECEIPT FOR SHORT TERM INSURANCE—NO POLICY ISSUED—INSURED NOT BOUND BY A CONDITION OF WHICH HE WAS IGNORANT.

104. WHEN AGENT'S RECEIPT IS NOT BINDING ON INSURER AFTER NOTICE OF REJECTION OF APPLICATION.

105. REFUSAL TO SIGN PREMIUM NOTE IN A MUTUAL COMPANY.

106. INTERIM RECEIPT BY MUTUAL COMPANY—NO POLICY ISSUED, BUT PAYMENT OF PREMIUM DEMANDED AND RECEIVED—ONT. INS. ACT APPLICABLE—WAIVER OF RIGHT TO CANCEL.

107. ONT. INS. ACT APPLICABLE—PROVISION REGARDING TERMINATION OF CONTRACT.

108. AGENT ACTING WITHIN HIS POWERS—NOTICE OF TERMINATION RECEIVED AFTER FIRE—ABSOLUTE RE-

PUDIATION OF LIABILITY PERMITS OF IMMEDIATE ACTION.

109. CONDITIONS OF POLICY INCLUDING VARIATIONS APPLYING DURING TERM OF INTERIM CONTRACT.

110. INTERIM RECEIPT NOT A POLICY WITHIN THE MEANING OF ONT. INS. ACT—CONDITIONS SHOULD BE READ INTO IT.

111. PRIOR INSURANCE—APPLICANT NOT AWARE OF ENDORSEMENT ON APPLICATION AS TO STEAM POWER—AGENT'S AUTHORITY—DISTINCTION BETWEEN THE TERMS "VOIDABLE" AND "VOID."

112. ENLARGEMENT AND VARIATIONS OF TERMS OF INTERIM CONTRACT IN QUEBEC, ONTARIO, MANITOBA AND BRITISH COLUMBIA.

113.—CONCEALMENT OF PREVIOUS REFUSAL—NOTICE OF CANCELLATION RECEIVED AFTER FIRE.

114. INTERIM RECEIPT SUBJECT TO USUAL CONDITIONS OF POLICY.

115. COMPANY ENTITLED TO TERMINATE INSURANCE BEFORE EXPIRATION OF INTERIM CONTRACT.

116. NO ACTUAL DELIVERY, POLICY BEING RETAINED BY AGENT.

117. INTERIM RECEIPTS OPERATE INSURANCES, SUBJECT TO THE ORDINARY TERMS OF THE COMPANY'S POLICIES.

118. RECENT AMERICAN DECISIONS ON INTERIM CONTRACTS—BINDING SLIP—RIGHT OF TERMINATION ACCORDING TO THE USUAL TERMS OF THE COMPANY'S POLICIES—BROKER EFFECTING INSURANCE IS THE AGENT OF THE INSURED AND NOTICE OF CANCELLATION MAY BE GIVEN TO HIM.

97. General remarks on interim receipts.—Interim receipts for fire insurance, as the name implies, are intended to serve temporary purposes only; they are usually limited to a term sufficient

to enable the company to decide as to the acceptance of the application or otherwise, and to prepare the policy. They are issued in the interest of the insured as a written evidence that he is held covered pending the delivery of the policy, unless he is previously notified by the company of their refusal to undertake the risk, or the receipt stipulates that such preliminary insurance expires at the end of the period named therein without further notice.

They are interim contracts, legally binding on both parties, although not policies within the meaning of that term in the Ontario Insurance Act, and when they are made subject to the conditions of policy, according to the usual practice, such conditions ought to be read into them, as far as they may lawfully be made a part of the policy.¹

98. Griswold's definition of an interim receipt.—An interim receipt is a binding receipt for money paid as premium upon an insurance, provisionally agreed upon with an agent not authorized to issue policies, but subject to the approval of the company; such approval or objection to be notified to the insured within a certain number of days named, unless sooner revoked by the company and the unearned portion of the premium returned. If no response is made by the company, the insurance expires with the days named.²

99. Litigation concerning interim receipts.—Interim receipts have been very rarely the subjects of action in England. In Canada we have had a considerable amount of litigation concerning them.

100. Interim receipt not establishing payment of premium. An insurance by simple receipt for the premium is legal and binding without the issue of a policy.³ But, in an action for an insurance premium, to which payment was pleaded, it was held that the form known as an interim receipt did not establish payment, the receipt not stating that the premium was paid.⁴

101. When mere lapse of interim contract does not terminate insurance.—Where the defendants granted the plaintiff an interim receipt containing the following conditions “subject to the

¹ See *infra* § 110, but see also *infra* § 106. ² Griswold, 14.

³ O'Connor v. Imperial Ins. Co., 14 L. C. J. 219.

⁴ Canadian Fire and Marine Ins. Co., v. Kerouack, 2 L. N., 272.

"approval of the directors which will be signified by the issue of a policy within thirty days from date.....notice of rejection of risk received at the post office of applicant as given in application, cancels this receipt and insurance if not otherwise conveyed," it was held : That the mere lapse of thirty days without the issuing of any policy did not put an end to the insurance effected under the receipt.¹

102. Agent neglecting to forward application to company—Repeated issue of interim receipt—Mere lapse not voiding insurance—Intimation to terminate risk must be given—Interim receipt binds both parties.²—In the Ontario case of *Hawke v. Niagara District Mut. Fire Insurance Co.*³ the company was held to be liable under the following facts :—Plaintiff applied to the agents of the defendants to effect an insurance on certain buildings. The agent accepted the risk, and gave to the plaintiff the usual interim receipt, which stated "the said party and property to be considered insured until otherwise notified either by notice mailed from the head office, or by mail to the insurer's address within one month from the date hereof, when, if declined, this receipt shall become void and be surrendered. N.B. Should applicant not receive a policy in conformity with his application within twenty days from the date hereof, he must communicate with the secretary direct, as after one month from this date the receipt becomes void." The agent omitted to transmit the application to the company and the plaintiff, not having been notified, applied personally to the agent, who stated such an occurrence was not unfrequent, and by way of satisfying the plaintiff granted a fresh interim receipt, repeating this on four different occasions. It was held (1) that such renewed interim receipts were valueless there being in fact no new insurance effected ; (2) that the neglect of the agent to do his duty by not forwarding the application to the company, could not operate to the prejudice of the plaintiff ; and (3) that the mere lapse of a month without any notice to the assured did not render the receipt void, but the stipulation gave the company a month during which to consider the application, and enabled them to terminate the risk within that period ; but in such a case, if the company does not intimate an intention of

¹ *Turgeon v. Citizens Ins. Co.*, 9 Q. L. R. 78 : but see *infra* § 109, *Compton v. Mercantile Ins. Co.*, 27 Chy. 334. ² See also *infra* § 105.

³ 23 U. C. (Ch.) 139, and see also *Patterson v. Royal Ins. Co.*, 14 id. 169.

terminating the risk, then there is a contract for insurance for the year binding on the company on the same terms and conditions as the ordinary policies of the company. Both insurer and insured under an interim receipt are bound by the conditions of the policy ordinarily issued by the company; as, for instance the insured, to give notice of a change of title to the insured property, and the insurer, bound till he gives notice to the contrary, must give ten days notice, if such are the requirements of the policy.¹

103. Receipt for short term insurance—No policy issued—Insured not bound by a condition of which he was unaware.—Where insurance was obtained for one month and a receipt taken setting forth that the insurance was subject to the conditions contained in the ordinary policies of the company and a policy, though requested, was refused on the ground that it was not usual for so short a term, it was held that the insured was not bound by a condition which he had never seen, requiring notice of, and endorsement of consent to subsequent insurance.²

104. When agent's receipt is not binding on insurer after notice given of rejection of application.—If an agent forwards an application which distinctly states that only the home officers have authority to determine whether a policy shall issue, his receipt for the premium, setting forth that it is binding on the insurers till the policy is received, is not binding after the insurers give notice that they reject the application.³ If the receipt covers goods not covered by the policy subsequently issued, the contract may be enforced according to the terms of the receipt.⁴

105. Obligations under interim receipt reciprocal⁵—Refusal to sign premium note in a mutual company.—The company may demand the premium if the applicant can demand a policy. It has been held, however, in the United States⁶ that where defendant made written application for insurance to a mutual insurance company the rate of premium was agreed on and policy made out and defendant requested to take it and sign the premium

¹ *Grant v. Reliance Ins. Co.*, 44 U. C., (Q. B.), 229. *Hawke v. Niagara*, etc, 23 U. C. (Ch.) 139. *Gauthier v. Waterloo Ins. Co.*, 44 U. C. (Q. B.) 490.

² *Lafleur v. Citizens Ins. Co.*, Q. B. 22 L. C. J. 247

³ *Cotton, etc. Life Ins. Co. v. Scurry*, 50 Ga. 48.

⁴ *Wyld v. Liverpool, etc.; Ins. Co.*, 23 U. C. (Ch.) 442.

⁵ See also *supra* § 102.

⁶ *Real Estate Mut. Fire Ins. Co. v. Roessle* 1 Gray, (Mass.) 336.

note and pay the premium, which he refused to do, the company could not sue for the premium, there being no completed contract. The court reasoned that the proceedings on the part of defendant were merely the initiatory steps to a contract. The plaintiffs at defendant's request had prepared a policy which would take effect as a contract on being delivered and not before. By plaintiffs by-laws the policy was not to be delivered until the payment of the premium and the signature of the deposit note, neither of which had taken place. If a loss had occurred plaintiffs would not have been liable because there was no delivery of the policy. But this reasoning seems defective. The defendant might have compelled the execution and delivery of a policy; it would seem that the company might equally compel payment of the premium on tendering the policy to defendant.

106. Interim receipt by mutual company—No policy issued, but payment of premium demanded and received—Ont. Ins. Act applicable—Waiver of right to cancel.—B. applied to a mutual company for insurance on his property for four years giving an undertaking to pay the amounts required from time to time and a four months' note for the first premium. He received a receipt beginning as follows: "Received from B. an undertaking for the sum of \$46.50, being the premium for an insurance to the extent of \$1,500 on the property described in his application of this date," and then providing that the company could cancel the contract at any time within fifty days by notice mailed to the applicant, and that non-receipt of a policy within fifty days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B. and no policy was issued within the said time, which expired on March 4th, 1891. On April 17, B. received a letter from the manager asking him to remit funds to pay his note maturing on May 1st. He did so, and his letter of remittance crossed another from the manager, mailed at Owen Sound, April 20th, stating the rejection of his application and returning the undertaking and note. On April 24th the insured property was destroyed by fire. B. notified the manager by telegraph, and on April 29th the latter wrote returning the money remitted by B., who afterwards sent it again to the manager and it was again returned. B. then brought an action, which was dismissed at the hearing, and a new trial ordered by the Division Court and affirmed by the Court of Appeal.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that there was a valid contract by the company with B. for insurance for four years; that the statutory conditions in the Ontario Insurance Act (R.S.O., 1887, c. 167), governed such contract, though not in the form of a policy; that if the provision as to non-receipt of a policy within fifty days was a variation of the statutory conditions, it was ineffectual for non-compliance with condition 115, requiring variations to be written in ink of a different colour from the rest of the document,¹ and if it had been so printed, the condition was unreasonable; and that such provision, though the non-receipt of the policy might operate as a notice, was inconsistent with condition 19, which provides that notice shall not operate until seven days after its receipt.

Held also, that there was some evidence for the jury that the company, by demanding and receiving payment of the note, had waived the right to cancel the contract and were estopped from denying that B. was insured.²

107. Ont. Ins. Act applicable—Provision regarding termination of contract.—The plaintiff's testator applied to the defendants in writing for an insurance against loss by fire and undertook in writing to hold himself liable to pay to the defendants such amounts as might be required, not to exceed \$46.50, and signed a promissory note in favor of the defendants for \$15.25. The defendants' agent gave him a written provisional receipt for his undertaking for \$46.50, "being the premium for an insurance, etc." The receipt contained a condition to the effect that unless the insured received a policy within fifty days, with or without a written notice of cancellation, the insurance and all liability of the defendants should absolutely be determined. No policy was sent within the time limited, nor was any notice of cancellation given within that time, nor until, by letter, two days before a fire occurred on the insured premises. Held, that the application, undertaking, note and receipt constituted a contract of fire insurance within the provision of R. S. O., ch. 167, which could be determined only in the manner prescribed by the 19th of the conditions set forth in section 114, that is, when by post, by giving

¹ 60 Vic. c. 36 (O.) s. 169.

² Supreme Court of Canada, *Dominion Grange Mutual Fire Ins. Ass. v. Bradt*, 25 S.C.R. 154.

seven days' notice, and thus the contract was still subsisting at the time of the fire.¹

In appeal it was held per Hagarty, C.J.O., that this was a contract of insurance that could be terminated only in accordance with the nineteenth statutory condition, and that, at any rate, there had been a waiver of the provision as to cessation of the risk.

Per Burton & Osler, J.J.A. : That this was a mere incomplete or provisional contract of insurance for four years, and also an actual contract for 50 days, which came to an end by effusion of time, and that the nineteenth statutory condition did not apply to the provisional contract.

Per Maclellan, J.A. : That there was a contract of insurance and that the provision for determination by effusion of time was a variation from the statutory conditions which was not binding, not being printed in the required mode.²

In the result the judgment of the Q.B.D., 25 O.R., 100, in favor of the insured was affirmed.³

108. Agent acting within his powers—Notice of termination received after fire—Absolute repudiation of liability permits of immediate action.—Upon a fire insurance company's local agent, acting within the scope of his powers and according to usage with such company, receiving the premium for an insurance and granting an interim or deposit receipt, subject to the approval of the chief officer of such company and the conditions of the company's policies, the applicant is insured until he has notice that the risk is declined. The mailing of the notice from the chief manager of the company at the head office to the local agent before the fire occurs, but which reaches him and is communicated to the insured after the fire, declining the risk is insufficient, and the liability of the company continues until communication of non-acceptance of the application reaches the insured. Where a company absolutely repudiates the insurance effected by the deposit receipt and when the policy has not issued, the right of action accrues at once and there is no necessity to give the preliminary notices and conforming to the delay and other conditions precedent in case of loss endorsed upon the companies' policies.⁴

¹ Barnes v. Dom. Grange Mut. Fire Ins. Ass. 25 O. R. 100.

² 60 Vic. c. 36 (O.) s. 169.

³ Barnes v. Dom. Grange Mut. Fire Ins. Ass. 22 A. R. 68.

⁴ Goodwin v. Lancashire Fire & Life Ins. Co., 18 L. C., J. 1, and see for further notice of this case *infra* § 113; but see *infra* § 109, Compton v. Mercantile Ins. Co., 27 Chy. 334.

109. Conditions of policy, including variations, applying during term of interim contract.—The plaintiff was insured by the defendant under an interim receipt, which stated that it was “subject to approval at the head office and to the conditions of the policy. Unless previously cancelled, this receipt binds the company for thirty days from the date thereof, and no longer.”

Held, that the conditions of the policy applied to the insurance during the thirty days and included any variations of the statutory conditions adopted by the defendants.¹

110. Interim receipt not a policy within the meaning of the Ont. Ins. Act—Conditions ought to be read into it.—An interim note being merely an agreement of interim insurance preliminary to the grant of a policy is not a policy within the meaning of that term in the Ontario Act. “Subject to all the usual terms and conditions of this company” in such a note means that the conditions ought to be read into the interim contract to the extent to which they may lawfully be made a part of the policy when issued by following the directions of the statute, subject always to the statutable condition that they should be held to be just and reasonable by the court or judge.²

111. Prior insurance—Applicant not aware of endorsement on application as to steam power—Agent’s authority—Distinction between the terms “voidable” and “void.”—The plaintiff had for some years insured his mill and machinery therein with the defendants, the policy having been effected through one of their local agents, there being also another insurance with another company. The plaintiff, desiring additional insurance thereon, signed an application therefor for a portion thereof through the same agent. On the application there was an endorsement, of which he was unaware, and to which his attention was not called, that where steam was used for propelling purposes, the proposal was required to be submitted to the defendants before the interim receipt was issued. The agent issued the interim receipt to the plaintiff at the time of the proposal, as was his practice, recognized by the defendants. The application, which contained a statement, without the names of the companies, of the amount of additional insurances effected elsewhere and also

¹ *Compton v. Mercantile Ins. Co.*, 27 Chy. 334.

² *Citizens Ins. Co. of Can. v. Parsons*, and *Queens v. do.*, 7 App. Case 96, and see 50 Vic. c. 26, s. 114.

the amount of the prior insurance with the defendants, was sent by the agent to the defendants, but was mislaid by them after they had made from it certain extensions on the policy, which had also been forwarded to them for that purpose. About two months after the date of the interim receipt, the defendants wrote their agent declining to continue the risk on the interim receipt, retaining, however, the portion of the premium earned, at the same time reinsuring half the risk. Of this the plaintiff was not informed, nor was any portion of the premium repaid him.

Held, that the endorsement formed no part of the application signed by the plaintiff, and that the agent was acting in the apparent scope of his authority, and was to be deemed *prima facie* to be the agent of the company; and, as the defendants never repudiated the contract, but merely determined to put an end to it and treated it as a subsisting contract, they were liable upon it.¹

Under the eighth statutory condition R.S.O., chap. 16i, sec. 114, the defendants claimed that they were not liable upon the receipt because there was prior insurance in another company and their assent did not appear in and was not endorsed on the policy, or that they were not liable upon their earlier insurance because of the subsequent insurance in other companies without their assent.

Held, that the application and the interim receipt constituted the contract of insurance, and as in this contract the total amount of insurance was truly stated, and the contract continued to be binding until after the loss occurred, the defendants must be considered to have assented to such insurance, and would be compellable to make their assent appear in or to have it endorsed on their policy if such policy were issued.

Held also, that the prior insurance was voidable, not void, and that the defendants, after the subsequent contract was entered into, in which the total amount of insurance was stated, and after they knew that it was entered into, had elected not to avoid the prior insurance, but to treat it as still subsisting by extending it.

Semble, that the defendants having assented to the insurance stated in the contract of insurance, could not assert that the effecting such insurance had the result of avoiding the prior insurance effected by their policy.²

¹ Cockburn v. British Am. Ass. Co., 19 O.R., 245 Q.B.

² *Ib.*

112. Enlargement and variations of interim contract in Quebec, Ontario, Manitoba and British Columbia.—It has been held in Quebec that the insured cannot be held to a compliance with any conditions of the regular policy issued by the insurance company which enlarge or vary the terms of the interim contract, so long as the company has neither repudiated nor cancelled the interim receipt or substituted a regular policy for it,¹ and the policy furnished must of course conform to the application.² In Ontario, Manitoba and British Columbia it is held to do so, unless the company has drawn attention in writing to any difference.³

113. Concealment of previous refusal—Notice of cancellation received after fire.—An applicant having been refused by one agent of a company applied to another agent of theirs, without revealing the first refusal, and obtained an interim receipt. The company cancelled the contract, but their notice did not reach the insured until after a fire had occurred.

The company pleaded fraud. The Court of Review held that there was no action. But the Queen's Bench condemned the insurance company⁴ and held the suit good (though brought within the sixty days); that the conditions of the ordinary policies of the company could not control, and that the insured was covered until the company's revocation reached him. The judges appear to have paid no attention to the objection of concealment of the refusal, though that fact was alleged to be material.

114. Interim receipt subject to usual conditions of policy.—In *Browning v. Provincial Ins. Co.*, a certificate of insurance was got by one Joel Leduc, reading "said insurance to be subject to all the conditions in the policy of the company." The policies of the company read "A. B., as well in his own name as for and in the name of every other person to whom the same doth or may, or shall appertain in part or in all, doth make insurance," etc. Leduc insured Montreal flour that he was shipping to Newfoundland, the property of Browning. The vessel on her way to Newfoundland was lost, and almost all the flour. Browning sued on the

¹ *Citizens' Ins. Co. v. Lefrançois*, R.J.Q., 2 Q.B. 550.

² *Can. Life Ass. Co. v. Perrault* M. L. R., 5 S. C. 62.

³ *Ont. Ins. Act 1897*, 60 Vic, c. 36, s. 168, ss. 2; *R. S. M.*, 1891, c. 59, Stat. Con. 2; *B. C. Ins. Policy Act*, 1893, chap. 12, Stat. Con. 2.

⁴ *Goodwin v. Lancashire F. & L. Ins. Co.*, 18 L.C.J. 1, and see for further notice of this case *infra*.

insurance that Leduc, his agent, had effected. The certificate was held not to be the complete contract, but that reference to the usual policies was to be made, and might be made.¹

115. Company entitled to terminate insurance before expiration of interim contract.—In a case in the Queen's Bench, Upper Canada (A.D. 1858), *Goodfellow v. The Times and Beacon Ass. Co.*, the insured was given a provisional receipt in these words: "Received from Messrs. J. G. & Co., \$14 premium for an insurance of \$2,000, on property described in the order of this date, subject to the approval of the board at Kingston; the said party to be considered insured for 21 days from the above date, within which time the determination of the board will be notified. If approved, a policy will be delivered; otherwise the amount of the receipt will be refunded less the premium for the time so insured." This was held not an absolute insurance for 21 days certain, but that the company might reject the risk within the 21 days at any time, and on notice the risk would end.²

116. No actual delivery, policy being retained by agent.—In *Fried v. Royal M. Co.*³ a premium was taken by an agent in New York, conditioned that the policy should be issued from the Head Office at Liverpool, or the premium returned if the insurance were declined. The policy was sent from Liverpool to the New York agent. He retained it, yet the insurance was held good; the contract being held perfected though the policy was not received by the insured, except as stated, and the company was condemned.

117. Interim receipts operate insurances, subject to the ordinary terms of the company's policies.—Interim premium receipts may really operate insurances during the interim term unless the wording be special.⁴

A memorandum or receipt, such as mentioned above, means that the insurance is to be according to the terms of the policies ordinarily used by the insurer.⁵

118. Recent American decisions on interim contracts—Binding slip—Right of termination according to the usual terms of the company's policies.—In a case where insurance was

¹ 5 P. C. App. Cas. 263; see Arnould, Vol. 1, p. 223 (3rd ed.) *contra*.

² 13 L. N. 164. ³ 47 Barbour, 127, and see *supra* § 68.

⁴ See the two interim receipts in *Montreal Assurance Co. v. McGillivray*, 9 L.C.R. 488.

In England interim receipts must be upon stamped paper.

⁵ See observations of Aylwin, J., in case of *Montreal Assurance Co. v. McGillivray*, 9 L.C.R. 488.

sought to be effected through brokers, what is known as a "binding slip" was signed by the secretary of the insurance company, in order to provide temporary insurance pending an inquiry as to the character of the risk, or any delay in issuing the policy. The day after this "binding slip" was signed and delivered to the brokers, the company gave them notice that the risk was declined. Within a few hours after the receipt of this notice there was a loss of the property by fire. The "binding slip" stated on whose account the insurance was made, the property covered, the amount insured, the term of insurance, and the date. The contention on one side was that the binding slip was a complete and perfect contract, binding the company, according to its language, "until policy is delivered at the office of the brokers" and not terminable by notice prior to that time or, if so terminable, only upon reasonable notice. The contention of the company was that it was a contract subject to the conditions contained in the ordinary policy in use by the company, the condition on which it relied to escape liability being as follows: "This insurance may be determined at any time by request of the assured, or by the company in giving notice to that effect to the assured, or to the person who may have procured this insurance to be taken by this company." Andrews J., speaking for the New York Court of Appeals, said: "We think there can be no doubt that the true construction of the binding slip only obligated the company according to the terms of the policy in ordinary use by the company. There is no other reasonable interpretation of the transaction. The binding slip was a short method of issuing a temporary policy for the convenience of all parties, to continue until execution of the formal one. It would be unreasonable to suppose either that the brokers expected an insurance except upon the usual terms imposed by the company, or that the secretary of the company, intended to insure upon any other terms. The right of an insurance company to terminate a risk is an important one. It is not reserved in terms in the binding slip, and could not be exercised at all so long as no policy should be issued, unless the condition in the policy is deemed to be incorporated therein. Upon the plaintiff's contention, the company could not cancel the risk so long as the binding slip was in force, and the only remedy of the company to get rid of the risk would be to issue the policy and then immediately cancel it. The binding slip was a mere memorandum to identify the parties to the contract, the subject

matter, and the principal terms. It refers to the policy to be issued. The construction is, we think, the same as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered ”¹

118a. Broker effecting insurance is the agent of the insured and notice of cancellation may be given to him.—The doctrine laid down in the preceding case was reiterated by the same court in another case and, the “binding slip” being considered the contract in the form of the ordinary policy of insurance with the usual conditions thereto attached, it was held that a contract in the form of a “binding slip,” given by the company to a broker applying for insurance for his principal was subject to the conditions printed on the company’s regular policies as to cancellation, etc., and especially that one which reads, “that if any broker or other person than the insured has procured this policy or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the insured, and not of the society, in any transaction relating to the insurance,” and that the contract represented by the “binding slip” was subject to cancellation upon notice being given to the broker to whom it was issued for the insured.²

¹ Lipman v. Niagara Fire Ins. Co. 1890, 121 N. Y., 454.

² Karelson v. Sun Fire Office of London 1890, 122 N. Y., 545.

CHAPTER VI.

INSURABLE INTEREST.

119. GENERAL REMARKS ON INSURABLE INTEREST.

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124. INSURABLE INTEREST IN A LIFE.

125. AMERICAN OPINIONS ON INSURABLE INTEREST IN A LIFE.

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186. INSURABLE INTEREST FOR REIMBURSEMENT OF EXPENSES.

119. General remarks on insurable interest.—The interest of an insurer against loss by fire may be that of an owner, or of a creditor, or any other interest appreciable in money in the thing

insured ; but the nature of the interest must be specified, at least in Quebec.¹

Insurable interest must exist or the insured cannot recover.² Whatever the law discourages and disapproves of, whether by special statute or on general principles enforced by the common law in the interest of good morals, good order and general public policy, will not be allowed to be fostered or encouraged by insurance. Subject to this limitation, whatever has an appreciable pecuniary value and is subject to loss or deterioration, or of which one may be deprived or which he may fail to realize, whereby his pecuniary interest is or may be prejudiced, may properly constitute the subject matter of insurance.³

The Civil Code of Lower Canada is said to contain a good summary of the English law of insurance.⁴

In *Castellain v. Preston*,⁵ Bower, L.J., said, referring to fire insurance, that it is an illusion to suppose that the assured can in any case recover more than his loss. We must look at the ordinary business rules. It is well known, of course, that a person with a limited interest may insure and recover the whole value of the thing insured, but then his policy must be apt for the purpose and he must have intended to so insure.

Again, a person may insure for himself, or for himself and others, as in the case of carriers and wharfingers, or, to take the case of a mortgagee, he is entitled to insure for other parties ; but if he only insures his own interest, he can only hold the damage to his own interest. That principle applies here. It was contended that a tenant from year to year may always recover the full value of the premises insured ; but although that contention would appear to be supported by the language of Lord Justice James, in *Rayner v. Preston*, I cannot assent to it.

It may be that the insurance companies do not as a rule take the trouble to ascertain the exact interest of the assured, because in most cases the insurance is for the benefit of all concerned ; but if a case were to occur in which a yearly or a weekly tenant were to insure, meaning only to cover his own interest, he could not recover and hold the whole value of the house.

¹ C.C.L.C. 2571 ; Marsh, 789 ; 1 Bell, Com. 540 ; Boud, n. 28.

² C.C.L.C. Art 2472 & seq. ; May on Ins., 71 ; Porter's Laws of Ins., p. 34.

³ Boulay-Paty, Droit Comm., tit. 10, para. 5 ; Pardessus, Droit Comm. 589, 2 & 4 May on Ins., 72.

⁴ Porter Laws of Ins., 17, and see C.C.L.C. Art. 2592. ⁵ 11 Q.B.D. 380.

It is true that in most cases the claim of the tenant from year to year, or for years, cannot be answered by handing over to him what may be the marketable value of his property, and he loses more than the marketable value of his property; he loses the house in which he is living, and the beneficial enjoyments of the house, as well as its pecuniary value. A man cannot be compensated simply by paying him the marketable value of his interest. But it does not follow that he gets or can keep more than he has lost.

It is well known in marine and fire insurance that a person who has a limited interest may insure nevertheless on the total value of the subject matter of the insurance, and he may recover the whole value, subject to these two provisions: 1st, the form of his policy must be such as to enable him to recover the total value, and, 2nd, he must intend to insure the whole value at the time.

120. Interest not insurable unless legal.—The general principle in regard to the illegality of the interest is well stated by Mr. Phillips to be, "that if a contract be intended to indemnify the owner from loss on property by reason of its being implicated in an illegal trade, or applied to an illegal use, or which, according to the laws of the country where the contract is made, it is criminal for the owner to hold, such contract is void; and accordingly the owner has no insurable interest."¹

This principle is frequently applied to marine insurance in cases of policies on cargoes of contraband goods or on ships sailing in violation of an embargo, etc., and though no cases are reported of its application to fire insurance, there seems to be no reason why it does not govern that branch of the subject as well as the other. It is forcibly remarked by Mr. Duer, "that there can be no more direct encouragement to the violation of a law than a contract that secures an indemnity to the transgressor."²

Therefore, it may well be questioned whether in such States as have enacted very stringent prohibitory laws in regard to the sale of intoxicating drinks, an insurance upon a stock of liquors, held in contravention of such a law, would not be invalid. In marine insurance, if the trade be illegal, it defeats the policy on the ship as well as that on the cargo, but it is doubtful whether an illegal trade on land would vitiate the insurance upon the

¹ 1 Phillips' Ins. 133.

² Duer's Ins. 315.

building in which it is carried on, particularly when the owner of the building is not the person engaged in the prohibited traffic.

In *Johnson v. Union Ins. Co., Mass.*, 1879,¹ the plaintiff insured on his stock and personal property, billiard tables, bar and saloon fixtures, stock in trade, liquors, cigars and glass ware. The plaintiff was not licensed to keep billiard tables for gain, which he was doing. The policy was held illegal, and the whole contract held void. The case was held to be governed by *Kelly v. Home Ins. Co.*, which held insurance null on liquors kept by an unlicensed person.

As said above, a right under a contract not enforceable at law or equity will not support a policy of insurance,² and among such contracts would be included a verbal contract for the purchase of real estate when it is not aided by part performance. But this proposition may not be good law now.³ The true proposition seems to be that neither an equitable nor legal interest in property is necessary to support insurance on it ; it is enough if the assured is so situated as to be liable to loss from its destruction.³

121. Stipulation that policy shall be proof of interest.—In England, in marine insurance, to agree by policy that the policy itself shall be proof sufficient of the insured's interest, or to insure "interest or no interest," makes the policy totally void as a mere wager. In Quebec such an agreement in fire assurance would be held valid to the extent of saving the insured from burden of proof of interest in the first instance.⁴

122. What is insurable interest.—Under the Civil Code of Lower Canada a person has an insurable interest in the object insured whenever he may suffer direct and immediate loss by the destruction or injury of it, and this is the common law.⁵

In England and the United States the earlier cases restrict the term "insurable interest" to a clear, substantial, vested, pecuniary interest, and deny its applicability to a mere expectancy, but the

¹ P. 5 Alb. L. J. 1880.

² Angell, § 69, and see *Stockdale v. Dunlop*, 6 M. & W., 224, 233; *Stainbank v. Fenning*, 11 C.B. 51, do. v. *Shepherd*, 13 C.B. 418.

³ 1 May, 96 n. 2, *Branford v. Saunders*, 25 W. R. 650; *Dalloz*, 1868, pt. 1388; *Joyce v. Swann*, 17 C.B.N.S. 84.

⁴ *Nat. Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N.Y. 535, C.C.L.C., 2472.

⁵ 13 L. N., 190.

⁶ C. C. L. C., 2474, May, 80, *Arnould*, 281 ; 1 *Phillips*, 27.

later decisions would seem to give a broader interpretation and allow an insurable interest to any one who either personally or as representing another has a reasonable expectation of deriving pecuniary advantage from the preservation of the subject matter of insurance.¹ The French law is, however, more restricted than the law in England and the United States.

122a. In Ontario.—Under the Ontario Insurance Act 1897,² modifying the Gambling Act, 14 Geo. III, c. 48, which is still in force except as so modified,³ in order to render valid any contract of insurance of the person except an annuity on life, the beneficiary under the contract being other than the assured or the parent or bona fide donee, guarantee or assignee of the assured, or a person entitled under the will of the assured or by operation of law, must have had at the date of the contract a pecuniary interest in the duration of the life or other subject, provided that any otherwise lawful contract of annuity upon life shall not require for its validity that the annuitant has, or at any time had an insurable interest in the life of the nominee.

And it has been recently formally decided in Ontario that a mother has an insurable interest in the life of her minor son who assisted her in her business.⁴

In England up to the passing of the Friendly Societies Act,⁵ and in Ontario prior to the Insurance Corporations Act 1892,⁶ no parent had an insurable interest in his child's life unless he had an actual pecuniary interest in it.

An insurance company lending money may validly agree with the borrower that he shall insure his life to a greater amount than the debt and assign the policy to the company as security, but in such a case the interest supporting the policy is the debtor's, not the creditor's.⁷

122b. In Quebec.—With regard to life insurance the Civil Code of Lower Canada, following the weight of foreign authority, declares that a man has an insurable interest in the life :

(1.) Of himself. (2.) Of any person upon whom he depends

¹ May 76. ² 60 Vic., c. 36, s. 150, ss. 1.

³ Dowker v. Canada Life Ass. Co., 24 U. C. R., 591; Craigen v. M. A. Life Ins. Co., 13 S. C. R., 278.

⁴ McCallum v. Metropolitan Life Ass. Co., R-report of Super. of Ins., 1892, p. 53.

⁵ Porter's Laws of Ins. 40. ⁶ See Hunter's Ins. Corp. Act, 1892, p. 39.

⁷ Porter's Laws of Ins. 43.

wholly or in part for support or education. (3.) Of any person under legal obligation to him for the payment of money or respecting property or services which death or illness might defeat or prevent the performance of. (4.) Of any person upon whose life any estate or interest vested in the insured depends.¹ And it decrees (in this also following the common law) that a policy of insurance on life or health may pass by transfer, will or succession to any person whether he has an insurable interest or not in the life of the person insured.²

123. Interest in fire policy must exist at time of loss, not so in life policy.—The interest insured in a fire policy must exist at the time of the loss unless the policy contains the stipulation of “lost or not lost,” But in a life policy, as we have seen, insurable interest at the date of insurance is sufficient.³

124. Insurable interest in a life.—May says that to have an insurable interest in the life of another one must be a creditor or surety, or be so related by ties of blood or marriage as to have reasonable anticipation of advantage from his life,⁴ but this statement would appear too narrow and not to cover an interest terminable on the death of a third party. A parent may be said generally to have an interest in the life of his child,⁵ or *vice versa*, or a sister in the life of a brother *in loco parentis*,⁶ or a wife in the life of her husband and *vice versa*.⁷ But a daughter cannot insure her mother's life unless she has pecuniary interest in it, as where she can claim alimony,⁸ nor a granddaughter that of her grandfather,⁹ nor a son-in-law the life of his mother-in-law.¹⁰

¹ C. C. L. C. Art, 2500; 1 Bell Com. 544; Angell, F. & L. Ins. § 297 to 300 et seq.; Dowdswell F. & L. Ins. 21; Imp. Stat. 14 Geo. III, c. 48, s. 1. Ellis (Shaws) c. 3, p. 232, 2 Alauzet. nos. 551 to 556. Quenault Ass., Ter. nn., 50, 51, 53.

² C. C., L. C., 2501, 1 Bell Com., 545, Ellis (Shaws,) c. 5, p. 263, 264.

³ Porter's Laws of Ins. 68, May, 450, C. C. L. C. 2475.

⁴ 1 May 102a.

⁵ Warnock v. Davis, 104 U.S. 779, but see Halford v. Kymer, 10 B. & C. 724, and Worthington v. Curtes, 1 Ch. D. 419.

⁶ Bliss' Life Ass. 17; Lord v. Dall, 12 Mass. 115; Loomis Adr. v. Eagle Life & H. Ass. Co., 6 Gray (Mass.) 396; Reif v. Union Mutual Ins. Co., Sup. Ct. Cincinnati; 17 Ins. Chron., p. 3.

⁷ Reed v. Royal Exchange, 2 Peake (Add. Cas.) 70; Baker v. Union Mut., 43 N.Y. 233; Curie v. Continental L. I. Co., 57 Vt. 496.

⁸ Continental Life Ins. Co. v. Volger, 89 Mich. 572; Aetna Life Ins. Co. v. France, 94 U.S. 561; Goodwin v. Mass. L. I. Co., 73 N.Y. 490.

⁹ Burton v. Conn. Mut. Life Ins. Co., 18 Ins. L.J. 713.

¹⁰ Renback v. Piedmont etc., L. I. Co., 35 La. An. 233; but see for Quebec C.C.L.C. 167.

It was held in one case in the United States that a woman might insure the life of her betrothed,¹ but this decision was afterwards limited.²

The decisions on this point show, as in those on fire insurance commented on *supra*, a tendency to advance from strictness to liberality.³

It was formerly held that the interest must be a pecuniary one, and it was laid down in England that a father had not a farthing's interest in the life of his son,⁴ but, as shown above, the tendency of the later decisions is more liberal.

As the premium is intended to be a precise equivalent for the risk taken, it would seem that the contract is a just and equitable one whether any interest in the life exists or not; and that the only essential enquiry is, whether the object of the contract is such as to obviate the objections to a mere wager upon the chances of human life.⁵

In case of creditors whose interest is susceptible of exact pecuniary measurement, the sum fixed is reduced to the actual interest at the date of effecting insurance.⁶

The sum recoverable under a life policy is limited to the amount or value of the insured's insurable interest in the life insured at the date of the policy.⁷

An insurance on the life of A by B, a creditor, as a trustee for C, who has no interest in the life, would be void.⁸ Although the debt may have been paid since the date of the insurance, the policy money is still recoverable.⁹ This is in the case of life policies, not fire.¹⁰

The two leading English cases which controlled the law on this question of indemnity in life policies were *Dalby v. The India & London Life Co.*, and *Law v. London Indisputable Co.*¹¹

¹ *Chisholm v. Nat. Capl. Life Ins. Co.*, 52 Mo. 213.

² *Singleton v. St. Louis M. Life Ins. Co.*, 66 Mo. 63.

³ *Stock v. Inglis*, 13 Q.B.D. 364; *Porter's Laws of Ins.*, 39.

⁴ *Halford v. Kymer*, 10 B. & C. 725.

⁵ *Forbes v. American Mut. Life Ins. Co.*, 15 Gray (Ma.s.) 249; *Anderson v. Morice*, 25 U.R. 14.

⁶ See C.C.L.C. 2592, 2 *Pardessus*, n. 593, p. 479; 1 *Bell Com.* 544, 546, *Angell* § 288; 2 *Alauzet*, n. 352, p. 484.

⁷ *Hebdon v. West*, 3 B. & S. 579; *Law v. London Indisputable Life Policy Co.*, 1 Kay 223, 3 W.R. 155; *Porter's Laws of Insurance*, 43; *Von Lindenau v. Desborough*, 3 C. & P. 353; *Branford v. Saunders*, 25 W. R. 650.

⁸ *Lewin Law of Trusts*, 7th ed., 95.

⁹ *Law v. London Indisputable*, 1 Kay & J., 223.

¹⁰ See also § 167a *infra*.

¹¹ 24 L.J.C.P., 2; 24 L.J. Ch. 196, referred to § 21 *supra*.

If a policy in the name and on the life of another be effected for his own benefit by a person who has no insurable interest in such life, and the insurance company, on the death of the person whose life is insured, pays the insurance money to the person effecting the insurance, he is entitled to retain the money as against the legal personal representative of the deceased; and although the illegality of the policy under 14 Geo. III., c. 48, on the ground of absence of insurable interest would have constituted a good defence to an action against the insurance company at the suit of the person effecting the insurance, yet, the money having been paid to him, such illegality would not affect his right to retain it; for the statute is a defence for the insurance company only if they chose to avail themselves of it.¹

125. American opinions on insurable interest in a life.—

Mr. Cooke, in his American work on life insurance, points out that the doctrine of insurable interest in a life, though so perfectly established as to be fundamental, cannot find justification in the rules applied to analogous cases. The supposition is that it is contrary to public policy that one person should receive a benefit conditional upon the death of another, and that the temptation to destroy that other's life must be balanced or counteracted by the existence of an insurable interest in that other's life. But this expectation exists in the case of a legacy, a dower or a substitution or life tenancy and the objection has never been applied to these cases.

Further, if the doctrine had a sound logical basis, the cessation of the insurable interest would cause the contract to become invalid. The contrary is the case.

The reason given for applying a different rule to fire insurance, viz., that it is a contract of indemnity, is not satisfactory, as it does not meet the objection. Under the common law it would seem that no insurable interest in a life is necessary,² though the contrary appears to have been commonly supposed. It was originally based on the construction of the Gambling Act.³

In the United States insurable interest must be pleaded as

¹ Porter, 71.

² *Vivar v. Supreme Lodge, etc.*, 20 Alt. Rep. 36 (1890); *Shannon v. Nugent, Hayes (Irish)*, 536; *Schweiger v. Magee, Cooke & Alc. (Irish)*, 182.

³ 14 Geo. III. c. 48.

well as proved,¹ but the insurer may waive the point by not raising it specially.²

The unsoundness of the doctrine of insurable interest is apparent from the decisions holding that to sustain insurance by a creditor it is not necessary that the amount of his debt equal or even approximate the amount of the insurance, though, if the amounts be grossly disproportionate, the contract is invalid, as a wager.³

*Dalby v. India & London Company*⁴ overruled *Godsall v. Boldero*⁵ and established the doctrine in England that a creditor is not limited to the amount of his debt, but may recover the full amount of insurance.

It is held in the United States that interest runs on the amount of claim from the time it is due.⁶ In Ontario it has been held to run from the time when claimant was in a position to give the insurer a discharge.⁷

Whether as between the parties the creditor's interest ceases on extinguishment of the debt depends on whether the agreement was to that effect. The creditor paid by the insurer may, in accordance with an agreement with his debtor, hold the money, or a part of it, as a trustee for the latter and subject to the latter's rights to collect it from him. In the absence of express agreement on the point, where the contract is effected by the creditor directly with the insurer, the creditor paying the premium, it seems generally accepted that the creditor is under no obligation to the insured or to his representatives with reference to such application. And where the creditor, not effecting the contract himself, either obtains his interest therein from being the beneficiary under the contract as effected by the insured or another person, or is the assignee of the insured or of another person, the rule still seems to be that the creditor, if he pays the premiums, is under no obligation to the insured or to his representatives with reference to such application.

¹ *Burton v. Conn. Mut. Co.*, 119 Ind., 207 (1889).

² *Cannon v. N. W. Trust Co.*, 29 Kan., 470 (1883); *Miss. Valley Co. v. Crumm*, 36 Kan. 146 (1887).

³ *Rittler v. Smith*, 70 Ind., 261 (1889); *Cammack v. Lewis*, 15 Wall, 643 (1872).

⁴ 15 C.B., 365 (1854).

⁵ 9 East, 72 (1807), referred to *supra* § 21 and § 124.

⁶ *Supreme Lodge A.O.W. v. Zahlke*, 129 Ill., 298 (1889).

⁷ *Toronto Savings Bank v. Canada Co.*, 14 Grants Chy. U.C., 509.

Payment of premiums by the insured is the circumstance usually relied on as establishing an implied agreement that the creditor, after satisfying his debt, shall pay over the balance, if any, to the insured or to his personal representatives. Yet it seems that payment of the premiums by the insured is of itself insufficient to create such obligation on the part of the creditor; it seems that the contract must have been originally effected in pursuance of an agreement between the insured and creditor that it be so effected.¹

126. The rights of the beneficiary as affected by acts and declarations of the insured.—In so far as the statements of the insured are contained in the contract or so far as his acts violate the contract, the beneficiary is bound by such statements and acts. But statements of the insured not contained in the contract cannot prejudice the beneficiary,² unless they are so closely connected with the subject matter of the contract as to be regarded as in effect statements contained in the contract.³

127. Duration of interest.—The general rule is that the insured must have an insurable interest both at the time of insurance and at the time of loss,⁴ but this is modified as to life policies. It has been held by the Supreme Court of Canada that if the assured had no interest in the property at the time of insurance, a subsequently acquired interest will not save the policy, and a renewal after the interest is gained, being a mere continuation of the void policy, is itself void.⁵ But though given by the highest court in Canada this decision seems difficult to reconcile with the view now generally accepted that the renewal is not a mere continuation of the old policy, but a new contract.⁶ If, knowing the facts, the company recognizes the policy as valid and executes a renewal, there would seem to be the *aggregatio mentium* and all the elements of a valid new contract based on a good insurable interest.

¹ Knox vs. Turner, 39 L.J. Ch., 750 (1870); Washington Central Bank v. Hume, 128, U.S. 195 (1888), and see cases cited in Clarke on Life Ins. § 128.

² Maynard v. Rhodes, 5 Dowling and Ryland, 266 (1874); Butler v. State Mut. Co., 55 Hun, 296 (1890).

³ Swift v. Massa. Mut. Co., 63 N.Y., 186 (1875); Smith v. Nat. Ben. Soc., 123 N.Y., 85 (1890). ⁴ May 100, C.C.L.C. 2475.

⁵ Howard v. Lancashire Ins. Co., 11 S. C. R. 92, reported *infra* § 156.

⁶ See *supra* § 95, Fireman's Ins. Co. v. Floss & Co., 67 Md. 404; King v. Heckla Fire Ins. Co., 58 Wis. 508.

128. Continuity of interest.—In the absence of any condition against alienation which avoids the policy, the insurers are not prejudiced by an interruption of the insurable interest and their liability ceases during the period of interruption to revive again after the interruption.¹ So a violation of the conditions against over insurance or sale, and upon principle any like condition non-existent at the time of the loss does not work a forfeiture but only a suspension of the insurance during the violation.²

129. Griswold on insurable interest in fire insurance says: To make an insurance policy legal and valid, the insured must possess such an interest in the subject of insurance as may be sufficient for the purpose of deducing the existence of such a loss to him from the occurrence of injury thereto by fire, as may be pecuniarily valued.³

As many several and distinct “insurances” may exist simultaneously upon the same property as there may be separate insurable interests connected therewith, without creating “other insurance” or necessitating co-contribution for losses, as mortgagors and mortgagees, lessors and lessees, factors and owners.

No insurable interest will exist, however, in cases of liens until everything has been done which may be necessary to give such lien effect and validity.

Griswold says further: ‘It is an important requisite in all insurances that the interest to be covered must be a legal one; for a policy upon a subject is void if the interest thereby covered is illegal, or if the contract contemplates an illegal use of it.

One having an insurable interest in productive property may insure the prospective earnings⁵ arising therefrom; but these interests must be covered specifically as such, and usually at a fixed value and rate per cent.

Griswold also says, equity of redemption is the right to redeem a mortgaged estate after it has been forfeited at law for non-payment at the time appointed. The holder of such an equity has an insurable interest therein during its continuance.⁶

130. Insurance by agent must be valid and effective.—An agent or consignee procuring insurance must procure valid insurance with solvent insurers, and communicate their names.⁷

¹ May 101, n. 4, and see *infra* § 133. ² Id. ³ §§ 328, 329, 330. ⁴ § 310. ⁵ § 202. ⁶ § 207.

⁷ Boulay Paty, Vol. 3. Hurrell v. Bullard *et al.*, Q.B. Guildhall, Feb. 1863, cited in 13 L. N. 242.

If a person covenant to keep insured, his procuring a mere slip unstamped, or an unstamped premium receipt, will not in England satisfy such covenant, unstamped papers not making legal insurance.² A policy stamped (or interim receipt stamped) alone can make such an insurance. But in Quebec, no such Stamp Acts exist, therefore insurance by slip or mere receipt for premium is good, for the case of such a covenant.

Where there is a covenant to insure, if the covenantor do not act promptly and pay the premiums, the covenantee may pay them and sue for the amount.¹

If a person agree to keep insured, and get delay in consequence, he must not allow the policy to be uninsured even for two days, else he breaks his agreement and his delay ceases.³ This agreement is frequent where compromises are made.

By covenant persons may bind themselves to insure, *e. g.*, a tenant may and often does, under pain of forfeiture of lease. Such covenants are strictly enforced.³

And if a lessee bind himself to insure in the joint names of himself and lessor he must do so literally. Mere verbal evidence of the lessor saying that he would be satisfied with less (as evidence of waiver) will be rejected.⁴

130a. Agent to declare his interest.—When an agent claims indemnity he will have to declare his interest.⁵

The *negotiorum gestor* may insure, but ought to state his quality.

An agent may insure simply “as agent” and the principal be shown afterwards, but there must be no fraud.⁶

130b. Agent insuring for client to be named.—A broker or agent may insure for account of a client to be named, or may do so in his own name, if the conditions of the policy do not prohibit.⁷

In France, in the case of nominal insurance by broker, the principal may sue.⁸

130c. Warehousemen.—A, a wharfinger and warehouseman, insured goods in his warehouse, and “goods in trust and on com-

¹ Mayne on Damages, p. 200. *Hey v. Wyche*, 12 L.J.Q.B. 83.

² *Parry v. Great Ship Co.*, *English Jurist* of 1864, cited in 13 L. N. 243.

³ *Doe v. Gladwin*, 6 Q.B.R., cited in 13 L. N. 243. ⁴ *Ib.*

⁵ *Cusack v. Mut. Ins. Co. of Buffalo*, 6 L.C. J. 97. ⁶ 13 L. N. 237.

⁷ *Browning v. Provincial Ins. Co.*, 13 L.N. 235.

⁸ *Pardessus*, *Dr. Com.* pp. 566, 570. See *Arnould on Insurance*, p. 138.

mission therein." A. had goods belonging to his customers, on which he had a lien for rent and charges, but no further interest of his own. He had never charged his customers for insurance, nor did they know of the policy. The warehouse and goods insured were all consumed. The insurers refused to pay for customers' goods beyond the amount of A.'s lien. But A. was declared entitled to get the whole insurance. He would be a trustee for part of it.¹

In *Waters v. The Monarch Ins. Co.*,² the plaintiffs (warehousemen), not insurers, were not liable to the owners of goods which were burnt. But the plaintiffs had insured the whole value of the goods, though their personal interest was only for their charges as warehousemen, for which they had a lien. The insurance company was held liable in full.

Warehousemen and wharfingers may insure goods deposited with them, though without the previous authority of the owners; and the insured are entitled to recover the whole value. They must then account to the true owners for all except their own interest (say for charges on the goods).³

A warehouseman is *negotiorum gestor* of those who have goods with him, so that if he insure such goods and get paid, he may be sued by the owners of the goods. It is not so, however, in England, at law at least.⁴

In *Sideways et al. v. Todd et al.*,⁵ a wharfinger without the knowledge of the depositor insured goods deposited. The goods were placed with the wharfinger in storage and for sale by him. A fire happened and the goods were lost. The wharfinger received the insurance money. It was held that, though he needed not to insure,⁶ yet, having done so and received the money, he was bound to account to the depositors, as he held the goods for them.

130d. Common carriers.—In *London & N. W. R. Co. v. Glynn*,⁷ the plaintiffs, common carriers, insured goods "their own

¹ *Waters v. The Monarch F. & L. Ass. Co.*, 5 El. & Bl. Also *Jurist*, A.D. 1856, cited in 13 L. N. 238. ² *Id.*

³ *Watts v. The Monarch L. & F. Ins. Co.*, 34 E.L. & Eq. R., cited in 13 L. N. 238.

⁴ 13 L. N. 238. ⁵ 2 Starkie R. p. 400.

⁶ Above it is said "though he needed not insure." But query; for he really had two qualities: he was agent to sell, as well as wharfinger, and a commission on sales was agreed for. As to fire insurance, wharfinger's liability, the decision of the Master of the Rolls was affirmed, *N. B. & Merc. Ins. Co. v. Liverpool L. & Globe*, 36 L. T. 628 (A.D. 1877). See 13 L. N. 238.

⁷ 1 Ellis & Ellis. A. D. 1869, cited in 13 L. N. 238.

and in trust as carriers," against all loss that the assured should suffer by fire on the property particularized in the policy. It was held that, to the amount of the policy, the whole value of the goods in plaintiffs' possession as carriers was insured, and not merely their interest as carriers; and that plaintiffs would be trustees for the owners of the goods of the amount recovered, less plaintiffs' charges as carriers, and in respect of the goods.¹

In *Crowley v. Cohen*,² an insurance "on goods" was held sufficient to cover the interest of carriers in the property under their charge; for in general, if the subject of insurance be rightly described, the particular interest need not be stated. There may, however, be a condition reading otherwise or a code enactment, as in Quebec.

130e. Consignees, commission merchants.—One of the most important duties which the safety of merchandize requires in factors and consignees who act as factors is that of protecting it by insurance.⁴

Shaw (upon Ellis) cites several cases in which in the United States it has been held that by the custom of merchants it is the duty of a consignee or commission merchant to insure the goods of his consignor, though he may have received no express directions to that effect. Consignees for sale are not positively bound to insure, unless they have received orders so to do, or the usage of trade, or their habit of dealing with their principal, has raised an implied obligation to insure.⁵ In the Louisiana Annual Reports of 1855 there is a case in which this was held.⁶

Though it was said that a commission merchant is not bound to insure for his principal if not ordered, by general usage in a place, a commission merchant might be held bound to have insured.⁷

130f. Agent insuring in an exigency.—An agent not generally authorised to insure may, in unforeseen exigencies, acquire a right to insure to prevent a loss to his principal.⁸

¹ See also *London & N.W.R. Co. v. Glynn*, 1 Ell. & Ell. 5 Jurist N.S., in which it was held that carriers may insure goods entrusted to them, and to their full value, and not merely to cover their charges. But they must insure the goods as in trust, and for themselves in so far as interested. See 13 L. N. 238.

² Cited in 13 L. N. 238. ³ C.C.L.C. 2571. ⁴ Paley on Agency, 18.

⁵ Story on Agency, 111. ⁶ See 13 L. N. 242.

⁷ 13 L. N. 237, 242; see also as to "consignees"; *Lucena v. Crawford*, 2 B. & P. 306, 307; *Crowley v. Cohen*, 3 B. & Ad.; 2 Bos. & P. 324, new R.; *Cusack v. Mut. Ins. Co. of Buffalo*, 6 L.C.J. 97. ⁸ Story on Agency, 141.

130g. Agent rendering himself liable for a loss has an insurable interest.—Although A. is merely the agent of B. in obtaining from C. an advance of money on certain goods, yet, if he renders himself liable to B. for any loss which might arise after the sale of the goods, he has an insurable interest in the goods, and can therefore legally insure them in his own name to the full extent of the loss.¹

130h. Agent claiming in his own name—Consignee—Actual identification not necessary.—A person who insures as agent for another cannot sue for indemnity in his own name as principal. If a consignee sues for indemnity under a policy effected in his own name upon goods belonging to another, and for the recovery of the insurance on said goods, it is sufficient to establish that goods of the character and brand and of the quantity claimed were actually in the building where the goods were stored at the time of the insurance, and at the time the building and its contents were wholly burnt, without proving the actual identification of the goods described in the warehouse receipt.²

130i. Mandataries.—A mandatory has an insurable interest in the subject of the mandate; if power to insure has not been given him expressly, it is implied in most mandates.³

130j. Gratuitous mandataries.—In the United States a mere gratuitous promise to insure, unconnected with any relation of principal and agent subsisting between the parties, or with any duty arising from usage, is not binding, provided the promisor does not enter upon its performance. Such gratuitous mandatory can only be held liable for misfeasance, not nonfeasance,⁴ and so it would be in England. But in Lower Canada it would be otherwise.⁵

The negotiorum gestor ought to declare his quality, and insure.

In the United States and England, if such agent or person attempts to fulfil his promise, and is guilty of gross negligence or unskilfulness in the execution of his voluntary trust, he will be liable to the other party in an action on the case for all damages resulting from such negligence.⁶

¹ O'Connor v. Imperial Ins. Co., 14 L.C.J. 219.

² Wilson v. Citizens Ins. Co., 19 L.C.J., 175 Q.B. See also *supra* § 130e and *infra* § 131a.

³ Troplong, Mandat., 624, 13 L. N. 236.

⁴ 4 Johns. 84 ⁵ 13 L. N. 243.

⁶ Tracy v. Wood, 3 Mason, 132; Thorne v. Deas, 4 Johns. 84.

But when the situation or profession of the one who makes this gratuitous offer is such as to imply skill, as if, for instance, he is an insurance broker, or known to be well acquainted with the business of insurance, an omission of that skill will be held to be gross negligence.¹

131. Warehouse receipt held by a bank.—Where a bank held a warehouse receipt signed by the clerk of a warehouseman and endorsed by the latter, it was held that the receipt was invalid, as the clerk was not a warehouseman, and the bank was not entitled to recover on an insurance policy assigned to it by the warehouseman.²

The holder of warehouse receipts of grain had it insured and then endorsed the warehouse receipts to a bank as collateral security. It was held that under the Dominion Act, 31 Vic., c. 11, sec. 7, the property in the grain passed to the bank and he could not recover on a policy insuring him as owner.³

131a. Assignment of warehouse receipts—Goods need not be identified.—Goods held under a duly endorsed warehouse receipt, as collateral security for advances, may be properly and legally insured as being the property of the holder of such receipt, he being the party who made the advances.

In an action by appellant against the respondents for \$2,532.00, being the amount of a promissory note by R. to order of appellant and endorsed by W. M. & Co., this note was dated 27th April, 1867, and payable four months after date. The appellant alleged that about the 10th December, 1866, one R., a broker, or some other person acting through him, owned and possessed 1,000 barrels of refined coal oil, which were in M.'s warehouses, that is, 700 in warehouse number 1 and 200 in warehouse number 2, for which M. delivered warehouse receipts to R. under authority of the owners; that on the 26th December, 1866, R. assigned to appellant the warehouse receipts and the oil they represented by endorsing them; that on the 30th April, 1867, appellant re-transferred to R. 500 barrels, then stored in said warehouse, with the understanding that upon R. paying on the 2nd September, 1867, his note of \$2,500, he would reconvey to R. the remaining 500

¹ *Skiele v. Blackburne*, 1 H. Bl. 158; *Wyld v. Pyckford*, 8 Mees. & Wels. 443; 13 L. N. 242. ² *Todd v. Liverpool Ins. Co.*, 20 U.C.C.P. 523 (1870).

³ *McBride v. Gore Ins. Co.*, 30 U.C.Q.B. 451 (1870).

barrels of oil, whereupon he surrendered the two receipts for the 1,000 barrels and received back a warehouse receipt made by M. in the name of the appellant. The appellant on the 1st May insured with respondents these 500 barrels for a period of four months for \$4,000 in warehouses numbers 1 and 2. On the 18th August, 1867, the store number 1 was destroyed by fire and the oil consumed, whereupon he claimed the insurance to the extent of the amount of the principal and interest of R.'s note. The respondents pleaded that R. was never the owner of the oil, that the oil was never stored by R. or any one else giving R. or appellant control thereof, and that it was not there when the store number 1 was burned. That supposing M. & Co. were the owners of the oil, under 24 Vic., cap. 2, they could only give a warehouse receipt that would be a document of title in the hands of R. by making it in his own favor and endorsing it to the second holder. That at the time of effecting the insurance the appellants represented the oil to be in number 1 and number 2, and never notified the respondents of the increased risk by its removal into number 1. The court below dismissed the action on the ground that R. had no oil of the Victoria brand in store number 1.

Held, distinguishing from *Wilson & Citizens' Insurance Company*¹ and confirming the judgment of the court below, that it was proved appellant never had any oil there, but that, on the contrary, it was proved that there was no oil there of the description mentioned in the warehouse receipts, either at the time the insurance was effected or at the time the fire occurred.²

132. Goods not identified—Insurable interest.—In the case of insurance of a number of barrels of oil purchased by the insured, but not actually identified and separated from other barrels of oil contained in the building in which the oil was stored, the insured has, nevertheless, an insurable interest as proprietor in the property sold. A verdict of a jury in favour of the insurance company based on a charge of the judge that the property in the oil did not, under the circumstances, pass to the insured, will be set aside and a new trial granted.³

132a. Goods not identified, no insurable interest.—In *Box*

¹ 19 L.C.J. 175. ² Q.B. v. Hood & Western Ass. Co., 2 Q.L.D. 406, and *supra* § 130h.

³ Mathewson & Royal Ins. Co. 16 L.C.J., 45; but see *Box v. Provincial Ins. Co.* 15 U.C. Chan. *infra*. § 132a.

v. *Provincial Co.*,¹ 3,500 bushels of wheat, bought by the insured, and which formed part of a larger quantity, had not been separated from the rest; it was held that there was no insurable interest.²

Judge Mackay asks, what would have been the decision if there had been a total loss.³ In such a case the question of identification would not have been raised.

132b. Transferee of a warehouseman's receipt—Goods not identified—Insurable interest.—The transferee for value of a warehouseman's receipt for a certain amount of wheat not separated from a larger amount, has been held to have an insurable interest.⁴

133. Substituted goods—Absence of continuity.—It has been held in Ontario that policies cover after-acquired goods which have been substituted for those originally insured.⁵ And the interest in the subject matters insured need not be continuous, since absence of continuity only means absence of risk.⁶

134. Vendor's interest under agreement to sell.—A vendor who has agreed to sell for full value has, nevertheless, pending the contract of sale, an undoubted right to insure the premises sold. If such a vendor insures the premises describing them as "his," this is no misrepresentation, for, pending the contract, he remains the legal owner. The fact of the vendor insuring under such circumstances, being an assignee in bankruptcy, makes no difference from the case of an ordinary vendor.⁷

134a. Reserving special property in goods sold.—In the Nova Scotia case of *Rumsey & Merch. M. Ins. Co.*⁸ a vendor, V., who had supplied T. with goods under an agreement reserving to V. a special property in them, was held to have an insurable interest, although he said on cross-examination that if the goods had been destroyed the loss would have fallen on T.

¹ 15 U.C. Chy. Rep. 337. ² But see *supra* § 132, and *infra* § 133. ³ 13 L. N. 100.

⁴ *Todd v. Liverpool, etc., Ins. Co.*, 18 U.C. (C.P.) 192. This case was afterwards reversed on appeal, but not upon the general principle involved; and see *Mathewson v. Royal Ins. Co.*, 16 L.C.J. 45; *Clark v. Western*, 25 U.C. Q.B. 209; *Box v. Prov. Ins. Co. supra* § 132a.

Butler v. Standard 4 U.C. (App.), 391.

⁶ *Crozier v. Phoenix* 2 Han. (New Bruns.), 200, and see *supra* § 128.

⁷ *Gill v. Canada Fire & Marine Ins. Co.*, 1 O. R. 341, and see *Le Soleil v. Alby*. *Dalloz Jur. Gen. Ass. Cass.* 1868, 1, 38.

⁸ 4 Russ & Geld (Nova Scotia) 220.

134b. Unpaid vendor—Compulsory purchase of premises.—

The plaintiff insured his premises in the defendant's office by a policy which provided that their capital should be liable to pay to the assured "any loss or damage by fire to the buildings" not exceeding £1,600. The premises were afterwards required by the Metropolitan Board of Works under their compulsory powers, in order that they might be pulled down for the improvement of a street, and the amount of purchase money payable to the plaintiff was assessed by arbitration, according to the Land Clauses Act. After the board had accepted the plaintiff's title, but before he had executed a conveyance, the premises were destroyed by fire.

Held, that the defendants were liable to pay the plaintiff £1,500, the full value of the buildings at the time of the fire, and not merely the damage done to the buildings considered as old materials, for the dealings between the board and the plaintiff did not affect the defendant's contract.¹

134c. Interest of vendor—After sale.—The appellants granted a fire policy to one T. on divers buildings and their contents for \$3,280. In his written application T. represented that he was the owner of the premises, while he had really previously sold them to S., the respondent, subject to a right of redemption, which right T., at the time of the application, had availed himself of by paying back to S. a part of the money advanced, leaving still due to S. a sum of \$1,510. Subsequent to the application and after some correspondence, the respective interests of T. and S. in the property were fully explained to the appellants through their agents. Thereupon a transfer was made to S. by T., the amount thereof being left in blank and accepted by the appellants. The action was brought for \$3,280, the amount of the insurance on the building and effects.

Held, that at the time of the application for the insurance, T. had an insurable interest in the property, and as the appellants had accepted the transfer made by T. to S., which was intended by all parties to be for \$1,510, the amount then due by T. to S., the latter was entitled to recover the said sum of \$1,510, and that S. having no insurable interest in the movables, the transfer made to him by T. was not sufficient to vest in him T.'s rights under the policy with regard to said movables.²

¹ Collingridge v. Royal Exchange Ass. Co., 3 Q.B.D. 173.

² Supreme Court of Canada, Ottawa Agricultural Ins. Co. v. Sheridan, 5 S.C.R. 157, C.D. 200, Q.B., 2 L.N. 206.

134d. Vendor and Vendee—Goods “in transitu.”—The vendor, so long as he has or retains right to stop *in transitu*, may insure.

The vendee, after the vendor's stopping the goods *in transitu*, has no insurable interest.¹

135. Goods held in trust—Corn deposited with miller.—A bailment on trust implies that there is reserved to the bailor the right to claim a delivery of the property deposited in bailment. Wherever there is a delivery of property on contract for an equivalent in money, or some other valuable commodity, and not for the return of the identical subject matter in its original or altered form, this is a transfer of property for value, it is a sale and not a bailment. Where, therefore, corn was deposited by farmers with a miller to be stored and used as part of the current consumable stock or capital of the miller's trade and was by him mixed with other corn deposited for the like purpose, subject to the right of the farmers to claim at any time an equal quantity of corn of the like quality, without reference to any specific bulk from which it was to be taken, or, in lieu thereof, the market price of an equal quantity, on the day on which he made his demand, with a small charge for general purposes :—

Held, that such a transaction amounted to a sale from the farmer to the miller, and was not a bailment of the corn, and entitled the miller to claim in respect thereof upon a policy of insurance against fire as for his own property, notwithstanding that such corn was not specifically insured, or described, as required by the conditions of the policy, “Goods held in trust and on commission,” upon which condition the claim was resisted by the insurers.²

135a. Merchandise on trust and commission for which the assured are responsible.—A policy of fire insurance expressed the insurance to be on “merchandise, the assured's own in trust or on commission, for which they are responsible,” in or on certain specified warehouses, vaults, wharves, etc. Whilst the policy was in force certain chests of tea on a wharf included in the policy

¹ *Clay v. Harrison*, 10 B. & C., cited in 13 L.N. 214. But query ; for stoppage *in transitu* only acts to make a lien. The vendee can get the goods afterwards if he tender the price. ² *Kent Comm.* And the vendor after stoppage *in transitu* may sue for the price. See *Martindale v. Smith*, *Benjamin on Sales*, p. 600. The effect of stoppage *in transitu* is to restore the goods to the vendor's possession, not to rescind the sale.

² *South Australian Ins. Co. v. Randall* 3 P.C. 101.

were destroyed by fire. These teas had been deposited in bond by the importer with the wharfinger. The assured had purchased them from the importer, and the warrants had been endorsed in blank by him to the assured. Before the fire occurred, the assured had resold the teas in specified chests to customers, and had been paid for them; they held, however, the warrants on behalf of the customers, but merely for the convenience of paying if required the charges necessary for clearing the teas payable by such customers.

Held, that the policy applied only to goods belonging to the assured, or for which they were responsible, and the property in the teas having at the time of the fire passed to the purchasers, they were then at the purchasers risk, and were consequently not covered by the policy.¹

136. Perfect title not necessary—Fraudulent conveyance.—Insurable interest does not depend upon a perfect title.² Both vendor and vendee under a conveyance which is fraudulent as against creditors have insurable interests.³

137. Mortgagee—Assignment.—In 1877 T. held a policy of insurance on his property which he mortgaged to W. in 1881, and an endorsement on the policy, which had been annually renewed, made the loss payable to W. In 1882 T. conveyed to W. his equity of redemption in the property, and a few months after, at the request of W., an endorsement was made on the policy permitting the premises to remain vacant. The policy was renewed each year until 1885, when all the policies of the insurance company were called in and replaced by new policies, that held by W. being replaced by another in the name of T., to which W. objected and returned it to the agent, who retained it. The premiums were paid by W. up to the end of 1886. The insured premises were burned, and a special agent of the company, having power to settle or compromise the loss, gave to W. a new policy in the name of T. having the vacancy permit and an assignment from T. to W. endorsed thereon and containing a condition not in the old

¹ North British & Merc. Ins. Co. v. Moffatt 7 C.P. 25.

² Pettigrew v. Grand River Farmers' Ass., 28 U.C. (C.P.) 70; Milligan v. Equitable Ins. Co., 16 U.C. (Q.B.) 314; Sherbonneau v. Beaver Mut. Ins. Ass., 30 *id.* 472, 1 May 87; Marks v. Hamilton, 7 Wells., Hurl & Gor. (Exch.) 323.

³ Lerou v. Wilmarth, 9 Allen (Mass.) 382; Pettigrew v. Grand River etc., 28 U.C. (C.P.) 70.

policy, namely, that all endorsements or transfers were to be authorised by the office at St. John, N.B., and signed by the general agent there. The company having refused payment, an action was brought on the new policy against them and the agent who first issued the policy to T. was joined as a defendant, relief being asked against him for breach of duty and false representations. The Supreme Court of Nova Scotia set aside a verdict for the plaintiff in such action and ordered a new trial on the ground that his interest was not insured and that T. had no insurable interest to enable W. to recover on the assignment. On appeal from such decision to the Supreme Court of Canada :—

Held, reversing the judgment of the court below,¹ that the company, having accepted the premiums from W. with knowledge of the fact that T. had ceased to have any interest in the property, they must be taken to have intended to deal with W. as owner of the property and the contract of insurance was complete.²

138. Judgment creditor.—In New York and in Pennsylvania a judgment creditor cannot insure specific buildings of his debtor, but it is otherwise in the Province of Quebec.³

138a. Unprivileged creditor — No interest.—But a mere chirographic creditor has no insurable interest in the stock in trade of his debtor, and cannot hold a valid fire insurance thereon.⁴

139. Bill of sale of ship sufficient—Insurance by part owner.—The deposit by the insured of bills of sale and documents requisite for showing ownership of a vessel with the collector of customs for registration is sufficient to give an insurable interest, though actual registration be not made till after the destruction of the vessel by fire. If this be not so, the insured may fall back upon any anterior title registered, from which he can deduce insurable interest. Further, one of two trustees, part owners, can insure a vessel.⁵

140. Equitable interest sufficient.—A *bona fide* equitable interest in property, of which the legal title appears to be in another, may be insured, provided there be no false affirmation,

¹ 20 N.S. Rep. 487.

² Wyman v. Imperial Ins. Co., 16 S.C.R. 715. For other cases of insurable interest of mortgagee, see *infra* ch. VII.

³ 13 L.N. 235. ⁴ Hunt v. Home Ins. Co., 3 R.L. 455.

⁵ Moore v. Home Ins. Co., 14 L.C.J. 77.

representation or concealment on the part of the insured, who is, however, not obliged to represent the particular interest he has at the time, unless enquiry be made by the insurer. Such insurable interest in property of which the insured is in actual possession may be proved by verbal testimony.¹

141. Husband and wife.—In *Clarke et ux. v. Fireman's Ins. Co.*,² the policy was taken by a husband in his name only, covering the furniture in a house described. The defendants said that the furniture was really the separate property of the wife; and it was shown to be hers. It was held that, nevertheless, the husband might administer it and insure it in his own individual name; that he need not declare the extent of his interest; that, as to his wife's dotal property, he alone has the administration of it, though the wife is the proprietor of it; and as to her paraphernal property, he has the administration of it also, unless the wife, separately, be administering it.

A husband can insure as his own the property of the community existing between his wife and himself, and of which he is chief. Wives, if *marchandes publiques*, (public traders,) may insure their merchandise without their husbands' consent; and a wife, separated as to property from her husband, can insure her property, for such insurance passive is only an act of administration. As to married women, common as to property with their husbands, it is said by French writers that their contracts, unauthorized expressly by their husbands being null, they cannot effect an insurance, as they have not the administration of the common property. In the Province of Quebec, an insurance effected by such married woman is not null.³ Husband and wife would be allowed to sue upon it. In modern France, Boudousquie says such a contract will be held confirmed by the husband's ratification express or implied. In Louisiana an insurer would not be allowed after a fire to urge that his wife's insurance was a nullity.⁴

141a. Insurable interest in wife's property.—A. effected insurance on C.'s property, on which he held a mortgage under

¹ Whyte v. Home Ins. Co., 14 L.C.J. 301; but see C.C.L.C., Art. 2571, which requires nature of interest to be specified.

² An American decision, cited in 13 L.N. 223. see *infra* ch. viii.

³ This is Judge Mackay's opinion, see 13 L.N. 224, but see *infra* § 141c *contra*.

⁴ 13 L.N. 224.

authority from and in the name of C., with loss payable to himself. During the continuance of the policy the company notified A. that the insurance would be terminated and advised him to insure elsewhere. Such notice also stated that unearned premiums would be returned, but no payment or tender of same was made according to conditions of policy. A. took policy to agent of insurers, who was also agent of the W. Insurance Co., and left it with him, directing him to put risks in latter company. No receipt was given, and property was destroyed by fire immediately after. Company resisted payment on the ground that policy was surrendered, and contended on the trial, in addition that C. had parted with his interest in the property by giving a deed to one B., who had re-conveyed to C.'s wife, and that proper proofs of loss had not been given, claiming in reply to a plea of waiver in regard to such proofs that such waiver should have been in writing, according to a condition in the policy. They had refused to return policy on demand.

Held, reversing the judgment of the court below, (Fournier, J., dissenting) that C. had an insurable interest in the property at the time of the loss as the husband of the owner in fee and tenant by the courtesy initiate, and having had also an insurable interest when the insurance was effected, the policy was not avoided by the deed to B.

That the company, by wrongfully withholding the policy, were estopped from claiming that proofs of loss had not been given according to endorsed condition, and were equally estopped from setting up the condition requiring waiver of such proofs to be in writing, if such condition applied to waiver of proofs of loss.

That the measure of damages recoverable by tenant for life of the insured premises is the full value of such premises to the extent of the sum insured.

Per Fournier, J., dissenting, that the sending of a circular by the company and compliance with its terms by the assured in giving up the policy to the company's agent was a surrender of said policy, and plaintiff therefore could not recover.

Under the practice in Nova Scotia, where the wife is improperly joined as co-plaintiff with the husband, the suit does not abate, but the wife's name must be struck out of the record and the case determined as if brought by the husband alone.¹

¹Supreme Court of Canada, *Caldwell v. The Stadacona Fire & Life Ins. Co.*
11 S.C.R. 212.

141b. Insurable interest in wife's property.—In this last case, Ritchie, C.J., in his opinion in the case on the subject of insurable interest, said: "There can be no doubt that a husband has an insurable interest in his wife's property. The husband has a freehold estate in the land, and the exclusive right of occupation; an indefeasible title to the land which no one can defeat or disturb, which gives him a full and perfect title to the rents and profits of his wife's real estate during the coverture, and in the event of the birth of a child he would enjoy said profits after the death of his wife during his life; and he is the proper person to insure the property, for the wife can make no contract in her own name to her own use; and, if she could insure the property, in case of loss, the insurance money so soon as paid would belong to the husband, inasmuch as the wife can acquire no personal property in her own right, as any she may obtain becomes immediately the property of the husband. All that is required is that the insured should have an interest at the time of the insurance and at the time of the loss; and, as to that interest, while there can be no doubt the party insured must have an insurable interest in the subject insured or he can sustain no loss, and, therefore, if the insured parts with his interest before loss happens, so that he has no interest left at the time of the loss, he cannot recover, yet if, pending the continuance of the policy and before the loss he acquires an interest, the policy, suspended while he had no interest, revives.¹

141c. Wife, common as to property, requires husband's authority to insure.—A married woman in community *sous puissance du mari* cannot insure her furniture without the authorization of her husband, and the fact that she has not declared her status to the company voids the insurance.²

142. Colorable transfer of mortgage.—The transfer, although notarial, of a mortgage, the subject of insurance, does not destroy the insurable interest then existing, a counter letter *sous seing privé* from the transferer showing that the transfer was merely nominal.³

The judgment in this case was reversed in the Privy Council on other grounds not passing on this point.⁴

¹ Caldwell v. Stadacona, F. & L. I.C. (1883), 11 S.C.R., 212.

² Rousseau v. Royal Ins. Co., M.L.R. 1 S.C. 305.

³ Montreal Ass. Co. & McGillivray 8 L.C.R., 401.

⁴ Privy Council 9 L.C.R., 498; 13 Moore's P.C. Rep. 87.

143. Colorable lease does not affect risk.—A colorable lease made to an individual for the purpose of constituting him a warehouseman, upon whose receipts the goods assured would be dealt with, does not affect the risk and void the policy of an insurance upon certain goods assured, whether his own property, held on trust or on consignment.¹

144. Usufructuary — Institute — Grevé de substitution.—A usufructuary has sufficient insurable interest to insure against fire, but he can only collect the value of the interest which he proves.² And where the insured declared himself owner, and was really institute (*grevé de substitution*) the policy was held good.³

144a. Usufructuary—proprietor—Where there is a usufruct, the proprietor, who insures,⁴ cannot recover beyond the value of his property, deducting value of the usufruct.

145. Landlord and tenant—Obligation of tenant to insure—Insurance by landlord—Option to purchase—Right to policy moneys.—Under the terms of a lease the tenant was bound to insure against fire and had an option of purchasing the property. He insured in a sufficient sum. The premises were damaged by fire and it then appeared that the landlord had a policy on the premises in another office of which the tenant had no notice; the two offices apportioned the amount of loss between the two policies and the landlord received what was thus payable under the policy effected by him. The tenant shortly after the fire gave notice to exercise his option of purchase and proposed that the insurance moneys under both policies should go in part payment of the purchase money. The landlord claimed to retain for his own benefit the money received under the policy effected by him, and insisted on the money under the other policy being applied in reinstating the premises, and on the tenant declining to do this, brought ejectment against him.

Held, that the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor

¹ Privy Council, *Lancashire Ins. Co. & Chapman* 7 R. L. 47, 13 L. C. J. 36, (not reported in P. C. App. Cas.)

² *St. Armand & Quebec Ass. Co.*, 14 R. L. 27, 9 Q. L. R. 162.

³ *Mutual Fire Ins. Co. & Villeneuve*, 4 Q. B. R., 376; M. L. R., 2 Q. B., 99.

⁴ 13 L. N. 223. The usufructuary of a house is not to share in the insurance money received after the burning of the house upon a policy taken by the *nue propriétaire*. *Besançon*, 26 Feby., 1856. *Alauzet, contra*, Tome 1, No. 140.

to insist on the moneys being applied in reinstating the property after the tenant had exercised his option of purchase.¹

145a. Landlord and tenant—Obligation of landlord to insure—Option to purchase—Right to policy moneys—Conversion.—Under the terms of a lease the landlord covenanted to insure, and the tenant had the option to purchase for a fixed sum. Before the time for exercising the option the buildings demised were burnt, and the landlord received the insurance money. The tenant then exercised his option to purchase and claimed the insurance money as part of his purchase.

Held, that under the circumstances the tenant had no claim to the insurance money. The principle of *Lawes v. Bennett* (1 Cox 167) is not to be extended. *Reynard v. Arnold* (Law Rep., 10 Ch. 386) distinguished.²

145b. Insurance by tenant.—In Quebec, as in France, a tenant must pay his landlord's damage where the house occupied by the tenant is burned by negligence, and where a house is burned the tenant is presumed negligent.³

Such a tenant can insure himself against the loss to which he is exposed by a landlord's suit against him in such a case.⁴

145c. Exemption of tenant in England.—In England, in case of accidental fire and the destruction of the leased house, the tenant at common law would have been guilty of waste if he neglected to rebuild. But by 6 Anne, c. 31, made perpetual by 10 Anne, it is enacted that no suit shall lie against any person in whose house accidental fire shall begin, or recompense made by such person for any damage suffered, except in case of contract between lessor and lessee to the contrary.⁵

If the lessee covenant to repair, and the house is burned by accident or otherwise, he is bound to rebuild.⁶ So it is common to stipulate in leases against accidents by fire.⁷

146. Insurable interest on account of loss of rent by fire.—Loss of rent through a house being burned is not a loss by fire within the meaning of ordinary policies. By condition on many policies such loss is declared not to be insured against. But it may be

¹ *Reynard v. Arnold*, 10 English Chy. Rep. 386.

² *Edwards v. West*, 7 English Chy. Rep. 858.

³ C. C. L. C. 1629. ⁴ 13 L. N., 212.

⁵ *Comyn* 201. ⁶ *Ib.* 202. ⁷ 13 L. N. 214.

made by agreement the subject of insurance. Any person having interest in rent may insure the rent from loss by fire, and he gets paid in case of loss from the time of the fire up to the time fixed by the policy.

A rector of a parish in Quebec insured himself against loss of his salary if his church were burned down. He depended for income chiefly upon the pew rents. The church was totally destroyed by fire, and the rector was paid by the insurers until it was rebuilt.²

A railway company has an insurable interest in buildings liable to be burned by sparks from its locomotives and for which injury the company would be obliged to indemnify.³

Rent may be insured by the proprietor: *e. g.*, on the rental only of a house belonging to assured occupied by A, \$400. This insurance is payable only in the event of the house being damaged or destroyed by fire so as to be untenable, and the insurance covers the rental of said house from the time of the fire, during the period necessary for its reinstatement, or of perfect repair, not exceeding one year's rent.⁴

147. Insurable interest of proprietor on account of liability to indemnify neighbor.—In France and Quebec, a proprietor who, in case of a fire in his house, may be held liable to indemnify his neighbors for the losses of their houses burned by the fire communicating to them, can insure not only his own house but also himself against losses to which he is exposed by the operation of actions in warranty of his neighbours.⁵

148. Claim by postponed bondholder—Reinstatement—Rent of mortgaged premises.—The pursuers having a heritable security by bond on certain premises insured them against fire in the defenders' office for £900. Prior securities had been given by the owner upon the same premises to other creditors and those creditors had insured in other offices. The premises having been in part destroyed by fire, the prior incumbrancers recovered from and were paid by the offices in which they were insured an amount sufficient for the reinstatement of the premises and for the payment of the rent during the period of reinstatement, but the premises were not in fact reinstated.⁶

¹ 13 L.N. 214. ² *Id.* ³ *Id.* ⁴ *Id.* ⁵ *Id.*

⁶ See also *supra* § 23b, 23c & 24.

It appeared that immediately before the date of the fire the value of the premises was sufficient to cover the prior bonds and that of the pursuers, but in consequence of the fire the value of the premises was so reduced that they were not sufficient to meet the balance remaining due to the prior creditors and the pursuers bond was left entirely uncovered :—Held, affirming the judgment of the Court of Session (14 Court Session Cas. 4 Series, 947) that the pursuers were entitled notwithstanding the amount paid to the other creditors, to recover to the full extent of their loss. But held, reversing the judgment of the Court of Session, that the pursuers were not entitled to recover anything in respect to the loss of rent of the premises after they had been damaged by fire. *Semble*, per the Earl of Selbourne, and Lord Watson, that 14 Geo. 3, c. 78, s. 83, relating to the application of insurance money on houses destroyed by fire does not extend to Scotland.¹

149. Innkeepers.—An innkeeper may insure the value of his own and travellers' goods, for if lost he would be held responsible for their value.²

150. Pawnbrokers.—A pawnbroker, being liable in Quebec and in France, has an insurable interest. Goods in pawn are generally required to be insured as such.³

151. False bidders.—In Quebec a *fol enchérisseur* may insure for his own benefit, but once the re-adjudication has taken place at his *folle enchère*, if the house burn the company is free, for the insured is dispossessed.⁴

152. Borrowers.—The borrower of a thing may insure it. The loan of it being for his sole advantage, if it be lost he has to pay, and negligence is to be presumed against him, at least in the Province of Quebec.⁵

153. Beneficiary heirs.—A beneficiary heir may insure, so also may tutors, assignees of a bankrupt's estate, churchwardens and trustees, and the *cestui que trust*,⁶ but though the trustee insure, the *cestui que trust* may, by the condition, be the person to get the money.⁷

¹ Westminster Fire Office v. Glasgow Prov't. Invest. Soc., 13 English App. Cas. 699. ² Dawson v. Cramney, cited in 13 L.N. 237. ³ 13 L.N. 237.

⁴ 13 L.N. 239, and see Sirey, A.D. 1856, p. 451. ⁵ 13 L.N. 239.

⁶ Hill v. Secretan, cited in 13 L. N. 236.

⁷ M. L. R., 1858, Brown v. H. Ins. Co., cited in 13 L. N. 236.

154. Insurance for owner without his authority.—A person may insure in his own name the property of another for the benefit of the owner without the latter's previous authority. Such insurance will enure to the party's interest intended to be protected, upon his subsequent adoption of it, even *after a loss*. And so, Judge Mackay is of opinion, it is in Quebec.¹

155. Insurable interest in prospective earnings or profits.—One having an insurable interest in property may also insure the prospective earnings or profits likely to grow out of that property. Of this nature is the frequent case of insurance on freight. It is necessary, however, that such interest should be insured specifically as such.²

In England and the United States, even inchoate interests arising from executory contracts of sale, and expectancies founded on subsisting titles, like profits and freight, have been frequently held insurable interests.³

As to profits or freight, the Quebec law allows them to be insured.

155a. Insurable interest in expected increase in value.—If there be an insurance on goods, the present value of which is £5,000, but it is expected that the value will rise, and an insurance is therefore effected for £6,000 in case of the value rising afterwards, and the goods being burned when worth that sum, probably that increased value can be claimed, though the real cash value at the date of the policy was only £5,000. But if the goods at the date of the fire be worth only £4,000, the insured cannot recover more than £4,000.⁵

155b. Insurable interest in thing not in existence or not yet acquired.—Goods not in existence at the date of the insurance, but meant to be, or to be acquired afterwards, may be the subject of insurance.

A policy covering for twelve months goods in a shop covers, to the extent of the sum insured, any goods of the insured put into the shop and lost by fire within the twelve months.

¹ 13 L. N. 236. On peut faire le bien d'une personne à son insu. *Beneficium est etiam invito prodesset*. But see C. C. L. C. 1043 & seq.

² *Abbott v. Schor*, 3 Johns Cas. 39; *Barclay v. Cousins*, 2 East, 544 & C. C. L. C. 2571.

³ *Columbia Ins. Co. v. Lawrence*, 2 Peters 151; *McGivney v. Fire Ins. Co.*, 1 Wend. 85; *Ætna Fire Ins. Co. v. Tyler*, 12 Wend. 507; 16 id. 385; *Hancox v. Fishing Ins. Co.*, 3 Sumner 132; *Barclay v. Cousins*, cited in 13 L. N. 195.

⁴ C. C. L. C. 2493. ⁵ 13 L. N. 196.

In the case of *B. A. Ins. Co. v. Joseph*,¹ Joseph insured "household and smith's coals contained in" a certain yard, for twelve months, for £1,000. No quantity was mentioned. At the date of the policy only 500 chaldrons were contained in the yard. These were added to. Afterwards, from spontaneous combustion, 853 chaldrons were burnt. The insurance company, sued by Joseph, pleaded that the original 500 chaldrons remained unburnt and that the fire had been caused by the other coals, uninsured, having been placed there wet.

The courts held that the policy covered the coals at the date of it in the yard and the others that were put there afterwards.

156. Subsequently acquired interest—Renewal merely a continuance of original contract.—J., the manager of appellant's firm, insured the stock of one S., a debtor to the firm, in the name and for the benefit of the appellant. At the time of effecting such insurance J. represented appellant to be a mortgagee of the stock of S. S. became insolvent and J. was appointed creditors' assignee. On March 8th, 1876, S. made a bill of sale of his stock to J., having effected a composition with his creditors under the Insolvent Act of 1875, but not having the same confirmed by the court. The insurance policy was renewed on August 5th, 1876, one year after its issue. On January 12th, 1877, the bill of sale to J. was discharged and a new bill of sale given by S. to the appellant, who claimed that the former had been taken by J. as his agent, and the execution of the latter was merely carrying out the original intention of the parties. The stock was destroyed by fire on March 8th, 1877. An action having been brought on the policy, it was tried before Smith, J., without a jury, and a verdict was given for the plaintiffs. The Supreme Court of Nova Scotia set aside this verdict and ordered a new trial on the ground that plaintiff had no insurable interest in the property when insurance was effected, and that no interest subsequently acquired would entitle him to maintain the action. By the practice of the court a verdict for the defendant could not be entered.

One of the conditions of the policy was "that all insurances, whether original or renewed, should be considered as made under the original representation, in so far as it may not be varied by a

¹ 9 L.C.R. 448.

new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings.

On appeal, the Supreme Court of Canada held that the appeal should be heard. 2. That the appellant having had no insurable interest when the insurance was effected, the subsequently acquired interest gave him no claim to the benefit of the policy, the renewal of the existing policy being merely a continuance of the original contract.'

157. Assured furnishing goods on board a vessel.—The assured in another case, by an arrangement with the charterer of a schooner for a trading voyage from Nova Scotia to Labrador and back, were to furnish the greater part of the cargo and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the assured, who were to pay themselves for their advance, to pay over any balance remaining to a third party and others. In trading on the voyage this party and others were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of, so as to obtain a return cargo in lieu thereof. There was a contention that the assured were merely unpaid vendors and had no insurable interest. It seems that the evidence upon which the insurer relied to sustain this contention was that of one of the assured, that "if the goods had been lost on the voyage to Newfoundland without insurance, the loss, I suppose, would have been Tupper's (the third party)." Ritchie, C. J. in the Supreme Court of Canada, said : "I cannot see how this can possibly affect in any way the liability of the insurers to the assured. The latter had supplied Tupper, and no doubt looked to him personally for payment, as well as to the goods over which it was agreed that they should retain the control for the purpose of securing such payment. But whatever may have been the relative liabilities of the parties as between themselves, it is quite clear that the assured had such a claim on these goods supplied and shipped, as on the goods acquired and shipped in good order and well-conditioned during such trading voyage, as would have been enforceable against Tupper had he endeavored to dispose of

¹ Howard v. The Lancashire Ins. Co., 11 S.C.R.. 92., referred to *supra* § 127.

them and divert the proceeds from the assured, contrary to the terms of the agreement.¹

158. Insurance on joint account.—Where several persons are jointly interested and a policy is taken out on their joint account, it is not sufficient to state the interest of one of these persons only.²

It is said, however, that if a person owns a fourth of a thing only, but insures it generally, he will only recover to the extent of his interest.³

158a. Co-heirs.—One of two co-heirs insuring a house as owned by himself has been held entitled to recover only half the loss.

If one co-heir can be considered agent of the others, he should not use his name alone as owner.⁴

158b. Tenants in common.—An insurance by one of several tenants in common will not protect the shares of the others; each of such tenant's interest is distinct from his co-tenants' interest.⁵

A joint tenant has an interest in the entirety entitling him to insure it, but unless he insures expressly for all the tenants, he can only recover his own part of any loss.⁶

159. Partners.—A partner may have an insurable interest in a building purchased with partnership funds, although it stands upon land owned by the other partner.⁷

160. Stockholders.—A stockholder in a corporation may insure his interest in the factory against loss by fire.⁸

161. Reversioners.—Sellers having right of redemption (*faculté de réméré*) may insure; but, in Quebec they must specify their interest.⁹

162. Minors.—Minors in France and in the Province of Quebec may insure.

According to Pardessus, if a minor does not pay the premium and the insurance expires without a loss having occurred, the

¹ Merchants' Marine Ins. Co. of Canada v. Rumsey (1884), 9 S.C.R. 577.

² Bell et al. v. Ansby, cited in 13 L.N. 235, and see C.C.L.C. 2571.

³ Id. ⁴ Id. ⁵ 13 L.N. 235. ⁶ Id., and see Page v. Fry, 2 Bos. & P. 240.

⁷ Converse v. Citizens' Mut. Ins. Co., per Shaw, Ch. J., cited in 13 L.N. 224.

⁸ Warren v. Davenport F.I.C., cited in 13 L.N. 224. ⁹ 13 L.N. 223. C.C.L.C. 2571.

company cannot, owing to the qualified nullity of a minor's contract, collect the premium. Boudousquieu and others say to the contrary, unless the contract has been unfair.'

163. Insurable interest for advances made on property.—

An assured made advances to another upon a vessel then in the course of construction upon the faith of a verbal agreement with the latter that after the vessel should be launched she should be placed in his hands for sale, and that out of the proceeds the advances so made should be paid. When the vessel was well advanced, the assured disclosed the facts and nature of his interest to the agent of the insurer, and the insurer issued a policy of insurance against loss by fire to him to a certain amount. The vessel was still unfinished and in the other's possession when it was burned. There was a contention that the assured had no insurable interest. Ritchie, C. J. in the Supreme Court of Canada, speaking for the court, said: "A court of equity would recognize an equitable security on the property for the advances and would enforce an appropriation of the property for their reimbursement; for it would be the grossest fraud for one party to refuse to perform after performance by the other, and the ground of the doctrine of part performance is fraud. That this agreement, though by parol, and the advances made under it, created an equitable charge on this property and gave the assured an equitable interest therein, principle and numerous authorities clearly establish, and it is in my opinion equally clear that if such equitable interest existed it was an insurable interest."²

164. Employer and employee — Interest of assignee.—

Master and servant may insure each other's lives.³ In a Quebec case⁴ it was held by the Court of Appeals that where the applicant was unable to pay the premium, and another party as a matter of speculation and without having any interest in the life of the applicant paid the premium and took a transfer of the policy, prepared by anticipation in the name of the applicant, the policy in the hands of such person was void. But the Supreme Court of Canada reversed this ruling⁵ and held that as the applicant had intended to effect a *bona fide* insurance for his own bene-

¹ 13 L. N. 223.

² Clarke v. Scottish Imperial Ins Co. (1879), 4 S. C. R., 192.

³ May, 109c.

⁴ Vezina v. N. Y. Life Ins. Co., 25 L. C. J., 232.

⁵ *Id.*, 6 S. C. R., 30.

fit, and as the contract was valid in its inception the payment of the premium, when made, related back to the date of the policy, and the mere circumstance that the assignee, who did not collude with the applicant for the issue of the policy, had paid the premium and obtained an assignment did not make it a wagering policy.

165. Interest of payee or beneficiary.—Upon the question whether a man may insure his own life for the benefit of another who pays the premiums, the jurisprudence in England¹ differs from that in the United States.² In Canada the case of *Vezina vs. N. Y. Life Ins. Co.*³ is consistent with the English ruling to the effect that the insurance cannot be nominally effected by a person on his own life really for the benefit of another who pays the premiums and to whom the policy is assigned. The mere circumstance, however, that some party paid the premiums would not *per se* be sufficient evidence that the insurance was not for the benefit of the person in whose name it was effected. A man may insure his own life himself by paying the premiums for the benefit of another who has no insurable interest⁴ or he may transfer it to that other.⁵

166. Life policy, a valued policy.—A life policy is almost always a valued policy, but not necessarily so.⁶

167. Creditor insuring debtor's life—Insurance in excess of debt.—In a noted English case⁷ a creditor, who had a running account, insured his debtor's life to secure the balance which might be due him. The insurance was for more than the balance due at death, but the balance only was paid.⁸

167a. Payment of debt not necessarily an indemnification of creditor.—It does not follow that because the debt is paid the creditor is indemnified. He has been paid in so far as the original debt is concerned, but he has not been indemnified in so far as the new debt contracted by the insurers to the insured is concerned.

¹ Porter's Laws of Insurance, 39. ² May 112.

³ 25 L. C. J., 232 and 6 S. C. R. 30., cited *supra* § 164.

⁴ See remarks of Ritchie, C. J. in *Vezina v. the New York Life Ins. Co.*, 6 S. C. R. at p. 44 and see recent case of *Hill v. United Life Ins. Ass.* (1893) 154 Pa. St. 29 following *Scott v. Dickson* 108 Pa. St. 6. ⁵ *Id.*, and Porter's Laws of Insurance 40.

⁶ *St. John v. Am. Mut. Life Ins. Co.*, 2 Duer (N. Y. Supr. Ct.) 419.

⁷ *Bruce v. Garden*, 20 L. T. R., N. S. 1002 and 22 *Id.* 595.

⁸ And see C. C. L. C. 2592, and see *infra* Ch. VII.

The annual payments of premiums are the equivalent and a profit besides of the total sum which the insurers agree to pay at the death of the debtor. So that, although he has been paid the debt subsequently to that time and before suit brought the original debt was paid by the debtor's executor, yet, as the debtor had in contemplation of law and according to the understanding of the parties and possibly in point of fact, in the meantime paid to the insurers sums of money, which in the aggregate amounted to a sum equal to that he received from the debtor, he would suffer a total loss, unless the insurers should pay him the amount of the policy. It does not hinder its being a contract of indemnity that insured has already or may later get something from others.¹

The doctrine that a creditor may claim from an insurance company, although the debt has been paid, applies to contracts of life insurance only.

167b. Insurance by creditor—Amount of policy in excess of debt—Recovery of the excess of premium paid.—A creditor obtained an insurance on the life of his debtor for an amount greatly in excess of his real interest. Both the creditor and the agent of the insurance company were ignorant that such extra insurance was invalid.

Held, that the insured was entitled to recover the excess of premium paid on the larger sum, and that, in the absence of proof to the contrary, the court would assume that the premium for the smaller sum was proportional to that paid for the larger sum.²

168. Assignment of life policy to party with no interest.—At the time the applicant applied for insurance on his life and the policy was executed, he effected it *bona fide* for his own benefit and as the contract was valid at its inception the payments of the premium when made, had relation back to the date of the policy, and the mere circumstance that the assignee (the insurance having been effected without his knowledge and there being no collusion between the parties) paid the premium and obtained an assignment, did not make it a wager policy.³

169. Action by surviving partners.—The life of J. S. McLachlan was insured against accident as one of the members

¹ Mav. 116, and see *infra* § 183.

² Q.B., London & Lancashire Life Ass. Co. & Lapierre, 1 L. N. 506, and see C.C.L.C. 2592.

³ Vezina v. New York Life Ins. Co., 6 S. C. R. 311, referred to *supra* § 164.

of the firm of McLachlan Bros. & Co., the insurers (defendants) undertaking to pay the sum of \$10,000 within ninety days after the death of one of the persons named in the policy, to the surviving representative of the firm. By one of the provisions of the policy it was stipulated that, when a member left the firm, the insurance should cease on his person. J. S. McLachlan ceased to be a partner seven months before his death by drowning, and the dissolution was duly registered. In answer to one of the questions submitted, the jury found that the firm was dissolved "but J. S. McLachlan had a continued and active interest in the "business." Held: that the insurance, as far as J. S. McLachlan was concerned, lapsed at the date of the dissolution of the partnership and the fact that he continued to have an interest in the business, did not entitle the other partners to maintain an action upon the policy.¹ On appeal, however, a new trial was ordered in this case on the ground that the verdict of the jury did not pass upon the real question in the case, namely, whether or not McLachlan had quitted the firm.²

170. Right to make policy on one's own life payable to any other person—Not affected by statute on wager policies.—The statute, 14 Geo. III., c. 48, enacts: 1. That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on other event or events whatever, wherein the person or persons for whose use or benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning of this Act shall be null and void to all intents and purposes whatsoever. 2. That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the name or names of the person or persons interested therein, or for what use, benefit, or on whose account, such policy is so made or underwritten. 3. That in all cases when the insured hath an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

¹ *McLachlan v. Accident Ins. Co.*, of N. A., M. L. R., 4 S. C. 265.

² 34 L. C. J. 43, M. L. R. 6 Q. B. 39, and see as to partnership interest, *Stillman v. Agricultural Ins. Co.*, 16 O. R. 145, and *Klein v. Union Fire Ins. Co.*, 3 O. R. 234.

Held, affirming the judgment of the court below, that this statute never was intended to prevent a person from effecting a *bona fide* insurance on his own life, and making the sum insured payable to whom he pleases, such insurance not being "by way of gaming or wagering" within the meaning of the first section of the Act.

Held, also, that section 2 of the said Act applies only to a policy on the life of another, not to a policy by a man on his own life.¹

171. Amount of life policy received by curator to insolvent estate may be claimed on behalf of wife.—The amount of a policy of insurance upon the life of a husband, the premiums on which have been paid by him and which has been received by the curator to his vacant estate by reason of insolvency, may nevertheless be claimed on behalf of the wife by two trustees who accepted the donation of the amount of such policy of assurance, made by the contract of marriage, for the purpose of paying over the interest to the wife and the principal to the children, notwithstanding that the donation and assignments were not noted upon the books of the company, notification having been given in a place other than the place where the insurance was effected.²

172. Insurable interest in the life of a step-sister.—The Court of Queens Bench, in a recent case of insurance upon the life of a child, the assured's step-sister, evidence being given of a promise made by the assured to the mother of the child to take care of the child and help to maintain it : Held that the assured had an insurable interest in the child's life, and was entitled in the absence of any objection as to the amount in fact expended by her, to recover the amount of the policy.³ Lord Coleridge, C. J., said : "In carrying out her undertaking (to maintain the child) the assured might have had to pay for the education and maintenance of the child, possibly also for its burial. In that state of circumstances, it is said that the assured had no insurable interest in the child's life. Now, I agree that the insurable interest must be a pecuniary interest and that interest must be in existence at the time when

¹ Supreme Court of Canada, *North Am. Life Ass. Co. v. Craigen*, 13 S.C.R. 278, and see *Vezina v. New York Life Ins. Co.*, *supra* § 164. See also 60 Vic. c. 36 (O.)

² *Spiers v. Atty. Genl.*, 9 L.C.R. 450.

³ *Barnes v. London, Edinburgh & Glasgow Life Ins. Co.* (1891), *English L. R.* 1892, 1 Q. B. 664.

the policy is effected ; that is perfectly clear upon the authorities. Is there such a pecuniary insurable interest here ? I think there is. The expenses to which the assured undertook to put herself for the maintenance of the child were, as I have said, not expenses which she was bound to incur ; and in my judgment the assured undoubtedly had an insurable interest in the child's life so far as to procure repayment of the expenses incurred by her. I cannot find that anything has been said to a contrary effect. Taking the ordinary course of business as the guide to determine the law, I should have thought that it was a matter of common knowledge that obligations of this sort were obligations, repayment of which was habitually secured in this way. In my judgment the assured had an insurable interest in the child's life at least up to the amount of the payments actually made by her on the child's account." Smith J. concurring said : "No doubt the contention of the (insurers) is correct, that unless the (assured) had a pecuniary interest in the child's life at the time the contract of insurance was made, the policy would be void under the statute. I think, however, that the (assured) had such an interest. A man can insure the life of his debtor. For instance, suppose an agreement by a debtor to pay his creditor one thousand pounds by successive monthly instalments of one hundred pounds, the creditor could insure his debtor's life, and at his death recover in an action on the policy against the insurance company. In the present case there is sufficient evidence of an undertaking on the (assured's) part to incur expense in maintaining, bringing up, and perhaps in burying the child. This decision does not trench on the cases in which it has been held that a father has no insurable interest in the life of his son. There is an obligation in law on a father to maintain his son. There is no such obligation here, but an undertaking to incur expense ; and I can see no reason why the (assured) having incurred and incurring such expense, has not a pecuniary insurable interest to the extent of each sum of money as it was successively expended by her for the child's benefit, of course so long as the total amount does not exceed the amount of policy."

173. Testamentary executors.—A life insurance policy is a moveable, and as such is payable to the testamentary executor of the deceased.¹

¹ Archambault & Citizens' Ins. Co., 3 L.N. 416, and 24 L.C.J. 293 S.C. 1880.

174. Friendly societies—Name of beneficiary need not be inserted.—An insurance by a member of a friendly society therein effected under 13 & Vic., c. 115, s. 2 does not fall within 14 Geo. III., c. 48, s. 2, and does not therefore require to have inserted the name of the person for whose benefit it is effected.¹ This is under the English Act.

175. Insurance effected with intent to murder.—A recent Ontario decision affirmed the principle that one who insures another's life with intent to murder him and obtain the benefit of the policy cannot recover.²

176. Recent American Decisions—Insurance on the life of a partner—Distinction between "assured" and "insured"—By the terms of policies issued by the company against which an action was brought, the company promised and agreed "to and with the said assured" to pay the sum assured to the said assured, his executors, administrators, or assigns," etc. The case was before the Supreme Court of the United States. The policy was applied for and issued to one of the partners of a firm on the life of his partner, on account of the failure of the latter to comply with his engagement to contribute an amount of money to the capital of the firm. The question considered by the court was, whether the term "assured" used in this policy meant the payee or the life insured. Justice Field for the court said: "The contention of the plaintiff is, that the words 'the assured' in the policy apply to the person for whose benefit the policy was effected, . . . and not to the party whose life was insured. There are undoubtedly instances where this distinction between the terms 'assured' and 'insured' is observed, though we do not find any judicial consideration of it. The application of either term to the party for whose benefit the insurance is effected, or to the party whose life is insured, has generally depended upon its collocation and context in the policy. We are of opinion that, reading the policy here in connection with the declaration and the answers of (the applicant) which form a part of it and indicate the object of procuring it, the term 'assured' must be held as applicable to him for whose benefit it was effected. The policy considered in *Ætna Life Ins. Co. v.*

¹ *Atkinson v. Atkinson*, (Chitty, J., 1895), English W.N., 114, 3.

² *Hendershott v. Covenant Mutual Ins. Co.*, Court of Appeals, Ont., 2nd March, 1897.

France 94 U. S. 561 gives some support to this view. There the policy was effected by a brother for a sister's benefit and the term "assured" was held to apply to the sister, for she recovered in a suit brought in connection with her husband on the policy. The attention of the court does not appear, however, to have been directed to that term. It may be said, also, that there could be little doubt as to its proper application in that case, as it was followed by the words, "and her executors, administrators, or assigns," thus limiting it to the sister. In other respects the language is substantially identical with that of the policy under consideration."¹

177. Insurable interest of an endorser on an accommodation bill.—An endorser of an accommodation bill has an insurable interest in the goods for which the bill was given, if it has been agreed that he shall be paid out of the proceeds of such goods.² In the American case of *Grant's administrators v. Kline*³ a creditor for \$300, who had paid about \$500 on abandoned policies on the life of his debtor, insured it again for \$3,000 and received the whole amount, which the courts allowed him to hold against the representatives of the debtor on the ground that the evidence did not show the insurance to be merely collateral, that the disproportion did not render the policy a wager, and that it was neither illegal nor immoral for the creditor to assure the sums he had fruitlessly paid on other policies on the same life as well as the debt.

178. Where no insurable interest, a wager policy.—In the absence of any insurable interest whatever the law will presume that a policy was taken out for the purpose of a wager or speculation.⁴

178a. Assignee without insurable interest.—A policy of insurance on the life of another taken by one who had an insurable interest in it for the purpose of assigning it to another who had no such insurable interest, and which purpose was effected, has been held by the Supreme Court of Pennsylvania to make the policy in the hands of the assignee a wagering policy upon which an action could not be maintained.⁵

¹ *Corn. Mut. Life Ins. Co. v. Incha*, (1882), 108 U. S. 493.

² *Davies v. Home Ins.*, 3 U. G. (App.) 260. ³ 115 Pa. St. 618.

⁴ *United Brethern Mut. Aid Soc. v. McDonald* (1888), 122 Pa. St. 324.

⁵ *Keystone Mut. Ben. Ass. v. Norris* (1886), 115 Pa. St. 446.

179. Assignment of life policies.—The law in some of the States regarding assignments of life policies is very different from that in Canada, consequently American decisions on this point are not applicable to Canadian cases.

179a. Fraudulent cancellation of assignment.—Where a policy was assigned by the beneficiaries to one who had no insurable interest in the life insured, she afterwards marked the assignment “cancelled” and returned the policy to the beneficiaries, the insured having died. The beneficiaries then for a certain sum sold it and assigned to a third party. The Kansas Supreme Court held that the assignment first made to one with no insurable interest was a wagering contract and that it was an attempted fraud upon the company for her to return it to the beneficiaries in the manner that she did in which the beneficiaries were participants, and that the second assignee standing in their place, could not maintain an action upon the policy.¹

179b. Assignee must have insurable interest.—The Alabama Supreme Court has adopted the rule that where a policy of life insurance is assigned during the life of the insured, the assignee must have an insurable interest in the life or he cannot recover; that the assignment of such a policy to one having no expectation of benefit or advantage from the continuance of the life of the insured founded on pecuniary relations, or those of blood or marriage, to one who is interested in the death of the insured rather than in his life, is open to all the objections which exist to the issue of the policy originally to such person.²

180. Policy on one's own life payable to one not a relative.—The Illinois Supreme Court has held that the insurance of one's own life, for the benefit of one not a relative was not void on grounds of public policy, as tending to encourage the commission of crime, and that, if it were, no one but the insurer could raise the question.³

181. Assignee having no insurable interest, policy held a wager.—It has been held by the Supreme Court of the United States that a person who has procured a policy of insurance on his

¹ *Mission Valley Life Ins. Co. v. McCrum* (1887), 36 Kan. 146.

² *Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.* (1886), 81 Ala. 329.

³ *Johnson v. Van Epp*, (1884) 110 Ill. 551.

life cannot assign it to parties who have no insurable interest in his life.¹ They said in this case: The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent to which the assignee stipulates for the proceeds of the policy beyond the sum advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded if the policy, or an interest in it could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money."

The contention that, if the contract was an illegal one, the representatives of the insured could not have a standing in court in a suit against the assignee who has received the proceeds of the policy on account of the insured's participation in the transaction, was disposed of by the Court as follows: "Although the agreement between the assignee and the insured was invalid so far as it provided for an absolute transfer of nine-tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties alike culpable, and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will therefore hold the recipient of the monies beyond those sums to account to the representative of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was also lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of a policy beyond what was required to refund those sums of interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life, and encourage the evils for which wager policies are condemned."

182. When a life insurance is a wager—Policy on one's own life may be made payable to any one.—The rule in Illinois

¹ Warnock v. Davis (1881), 104 U.S. 775.

is similar to that in Canada. The Supreme Court of Illinois has declared these rules in a case before them involving these same questions :

A policy taken out on the life of a third person by a beneficiary, the latter having no pecuniary interest in the life of the assured, is a wager policy, and as such is void, public policy forbidding one person who has no interest in the continuance of the life of another of speculating on that life by procuring a policy of insurance thereon without the knowledge or consent of the insured.

A person having, however, an insurable interest in his own life has a right to procure a policy on the same and have it made payable to any one whom he may appoint, although the beneficiary designated may not have any pecuniary interest in the continuance of the life insured. And when, under a charter of a mutual benefit association, a member thereof may take out a policy on his own life and devise such policy to a stranger, there was no reason why he might not have a policy made payable to the proposed beneficiary directly in lieu of doing the same thing by appointment in a will.¹ They further held in that case that where a Mutual Benefit Association voluntarily entered into a contract of insurance upon the life of a member for the benefit of one not expressly authorized or prohibited from becoming a beneficiary, which was not contrary to public policy and received all the premiums thereon, it would not be allowed to defeat a recovery of the policy, at the suit of the beneficiary, by claiming that the contract on the part of the association was *ultra vires*.

183. Assignment of policy on one's own life to third party legal—Continuance of interest of creditor in debtor's life not necessary—Payment of debt not terminating policy.—Since the above doctrine was declared by the Supreme Court of the United States, there has been a well discussed case in the Supreme Court of Mississippi in which that court takes a view contrary to that in New York and similar to the Canadian view.

They said : "The weight of reason and authority, we think, is against this view. There is an obvious difference between the two transactions. It is contrary to public policy for a person to insure a life in which he has no insurable interest, and to derive benefit and advantage therefrom. This is condemned as gaming

¹ *Bloomington Mut. Ben. Ass. v. Blue* (1887), 120 Ill. 121.

or wagering on the chances of human life, and as such is prohibited by law. But it is lawful for one to insure his own life, and after he has done so the policy becomes his own if payable, as in this case, and there is no reason why he may not sell or dispose of it, as he may of any other chose in action, if the policy was valid in its inception.

An insurable interest in the assured at the time the policy is issued is essential to the validity of the policy, but it has been often decided, as when a creditor takes out a policy on the life of his debtor, that it is not necessary to the continuance of the insurance that the interest in the life insured should continue. Cessation of interest, payment of the debt in the case supposed, would not terminate the policy.

If the danger to life is not adequate to avoid a policy in such case when the interest in the life insured ceases, it is not perceived why it should be deemed sufficient to invalidate a contract by which a policy is sold and assigned to one without interest. Besides, the protection should not be overlooked which is afforded to the life insured by the doctrine that one cannot recover insurance money payable on the death of a party whose life he has taken by felonious means. It would be a reproach to the law of the land if he were allowed to do so. He could not, in fact, do so, any more than he could recover insurance money on a building which he had wilfully set fire to and burned.”¹

184. Amount of policy disproportionately in excess of debt declared a wager policy—Insurable interest of a creditor.—The rule that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest and the amount of premiums with interest thereon, during the expectancy of the life insured, according to the Carlisle tables, has been enforced by the Supreme Court of Pennsylvania. In this particular case they held that where the disproportion between the amount of the policy taken out by a creditor on the life of a debtor and the debt thereby secured is very great, as for instance, where the insurance may be three thousand dollars and the debt one hundred dollars, it would be the duty of the court to declare the transaction a wager as a question of law.²

¹ Murphy v. Red (1887), 64 Miss. 614, and see *supra* § 167a.

² Cooper v. Shaeffer, Admr. (Pa. 1887), 11 Atl. Rep. 548.

185. Cessation of interest.—The Pennsylvania Supreme Court has held that, where one has an insurable interest at the time an insurance is effected upon the life of another for his benefit, the fact that his interest ceased to exist at or prior to the death of the insured will not, as against the personal representatives of the insured, deprive him of the right to receive the insurance money.¹

186. Insurable interest for reimbursement of expenses.—The insurable interest in the life of the insured of one neither a relative nor a creditor, insuring the life of another for his benefit, though conceded to be in good faith, and for the honest purpose of reimbursing him for the outlays which he might be called to make under an agreement with the insured to support him during life, has been limited to the amount that he actually paid for the support of the insured, or which he advanced in money, or otherwise, in fulfilment of his contract. Such an amount, and the amount expended for the insurance and for all legitimate expenses including interest, he was allowed to retain from the proceeds of insurance, and the balance adjudged to the estate of the insured.²

¹ *Appeal of Corson, Exr.* (1886), 113 Pa. St. 438.

² *Seigrist, Admr. v. Schmoltz* (1886), 113 Pa. St. 326.

CHAPTER VII.

INSURANCE BY MORTGAGEE OR HYPOTHECARY CREDITOR.

187. MORTGAGEE IS NOT ENTITLED TO BE INDEMNIFIED FROM TWO QUARTERS.

188. MORTGAGEE IN BRITISH COLUMBIA MUST BE NOTIFIED OF CANCELLATION OF OR CHANGE IN POLICY.

189. SUBROGATION CLAUSE — DISCHARGE OF MORTGAGE BY PAYMENT OF INSURANCE CLAIM TO MORTGAGEES.

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191. LOSS PAYABLE TO MORTGAGEES—CONSOLIDATION—ASSIGNMENT OF MORTGAGE—SUBROGATION.

192. MORTGAGE CLAUSE AS ADOPTED BY CANADIAN FIRE INSURANCE COMPANIES.

193. MORTGAGE CLAUSE—EFFECT OF—CONDITION OF POLICY—INTEREST OF MORTGAGEE NOT TO BE INVALIDATED BY ACTS OF MORTGAGOR—SUBROGATION—RETIREMENT OF PARTNER RETAINING AN INSURABLE INTEREST NOT A BREACH OF STATUTORY CONDITION—NOTICE TO A CLERK OF INSURER—NON-COMMUNICATION OF OTHER MORTGAGES—CONTRIBUTORY NEGLIGENCE OF INSURER—NON-ASSENT TO PRIOR INSURANCES—FORECLOSURE.

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198. LOSS PAYABLE TO MORTGAGEE—MORTGAGEE'S INTEREST NOT AFFECTED BY ACTS OF OWNER OF PROPERTY—COMPANY'S ASSENT TO ASSIGNMENT,

MAKES A NEW CONTRACT AND IS EQUIVALENT TO RENUNCIATION OF ALL THE CONDITIONS OF POLICY.

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203. LOSS PAYABLE TO MORTGAGEE—BREACH OF CONDITION OF POLICY.

204. CASE WHERE MORTGAGEE'S INTEREST CEASES.

205. INSURABLE INTEREST CONTINUING AFTER MORTGAGOR HAS SOLD PROPERTY.

206. CLAIM PAID BY COMPANY IN EXCESS OF MORTGAGE GOES TO DEBTOR.

207. LIFE INSURANCE—LIEN FOR PREMIUMS PAID.

208. LIFE INSURANCE—SALVAGE PREMIUMS—REIMBURSEMENT.

209. LIFE INSURANCE—MORTGAGE BY DEPOSIT—DEATH OF ASSURED—DISPENSING WITH LEGAL PERSONAL REPRESENTATIVE—PRIORITY.

210. RECENT AMERICAN DECISIONS—EFFECT OF MORTGAGE CLAUSE.

211. CONTRACT IN THE INTEREST OF MORTGAGEE—DISTINCTION BETWEEN A POLICY COVERING MORTGAGEE'S INTEREST ALONE, AND A POLICY IN MORTGAGOR'S NAME, BUT LOSS PAYABLE TO MORTGAGEE AS HIS INTEREST MAY APPEAR—OTHER INSURANCE WITHOUT CONSENT OF COMPANY.

212. INSURANCE FOR MORTGAGE CREDITOR—OTHER INSURANCE—MORTGAGEE INSURING HIS OWN INTEREST ALONE—POLICY PAYABLE TO "CREDITOR AS HIS INTEREST MAY APPEAR"—WAIVER OF CONDITIONS BY PAYMENT INTO COURT—CREDITOR MUST SHOW EXTENT OF HIS INTEREST—CONTRACT SUBJECT TO CREDITORS' CLAIMS.

187. Mortgagee is not entitled to be indemnified from two quarters.—It is said that under English law, while the mortgagor is not entitled to the benefit of the mortgagee's contract, the mortgagee is not entitled to be indemnified from two quarters.¹ And there is authority for this view in the United States also.² The question is one of some difficulty, but in so far as our courts in Canada have dealt with it, it would appear that in Quebec a mortgagee who has insured property and received the value from an insurer cannot recover from a mortgagor (after he has been paid by the insurer) on the principle of the civil law "*bona fides non patitur ut bis idem exigatur*."³

The English law would let him recover where he paid the premiums out of his own pocket under circumstances which did not entitle him to charge them to the mortgagor, but he would so recover for the benefit of the insurers who would be entitled on payment to be subrogated in his rights, independently of stipulation to that effect.⁴

The Quebec decision in Archambault & Lamere above referred to and based on the French law went on *bona fides*, but while it prevents the mortgagee from taking with both hands, it is open to criticism as giving the mortgagor the benefit of a security for which *ex hypothesi* he did not and could not be made liable to pay and to some extent would seem to go counter to the ruling principle of insurance,—*indemnity*.⁵ The Civil Code of Lower Canada gives to the insurers subrogation in the rights of the insured against the person by whose fault the loss occurred.⁶ It has been held in Quebec that a creditor who takes out a policy of fire insurance for his own protection and at his own expense on his debtor's property is not bound to account to the debtor for the portion of the insurance money paid to him under such policy and remaining as a surplus above the amount required to extinguish the debt.⁷ But this decision was questioned in a later case in appeal.⁸

It has been held in Ontario that the creditor who has without any express or implied agreement with his debtor insured to pro-

¹ Porter's Laws of Ins. 224.

² May 459a.

³ Archambault & Lamere 2 Q. B. R. 97, 26 L. C. J., 236, 5 L. N., 294.

⁴ Porter's Laws of Ins. 235.

⁵ *Ib.* 225, but see as to life ins. *infra*. ⁶ C. C. I. C. 2584.

⁷ Archambault v. Galarneau 22 L. C. J., 105.

⁸ Archambault & Lamere et al 26 L. C. J., 236, 2 Q. B. R. 97, 5 L. N. 294.

tect his claim, after receiving his insurance idemnity may still proceed to recover his debt.¹

188. Mortgagee in British Columbia must be notified of a change in policy.—In British Columbia, in cases where the loss is payable to a mortgagee with the company's consent, it has been specially enacted by the Legislature² that the policy cannot be cancelled or dealt with without notice to the mortgagee. And proofs of loss may be made by the mortgagee.³

189. Subrogation clause—Discharge of mortgage by payment of insurance claim to mortgagees.—Mortgagees of real estate insured the mortgaged property to the extent of their claim thereon under a clause in the mortgage by which the mortgagor agreed to keep the property insured in a sum not less than the amount of the mortgage, and if he failed to do so that the mortgagees might insure it and add the premium paid to their mortgage debt.

The policy was issued in the name of the mortgagor who paid the premiums, and attached to it was a condition that whenever the company should pay the mortgagees for any loss thereunder, and should claim that as to the mortgagor no liability therefor existed, said company should be subrogated to all the rights of the mortgagees under all securities held collateral to the mortgage debt to the extent of such payment.

A loss having occurred the company paid the mortgagees the sum insured and the mortgagor claimed that his mortgage was discharged by such payment. The company disputed this and insisted that they were subrogated to the rights of the mortgagees under the said condition. In an action to compel the company to give a discharge of the mortgage :

Held, per Fournier, Taschereau & Gwyne, JJ., that the insurance effected by the mortgagees must be held to have been so effected for the benefit of the mortgagor under the policy, and the subrogation clause which was inserted in the policy without the knowledge and consent of the mortgagor could not have the effect of converting the policy into one insuring the interest of the mortgagees alone ; that the interest of the mortgagees in the policy

¹ McPherson & Proudfoot 2 C. P. U. C. 57. Russell & Robertson, 6 L. J., 143. McIntosh & Ont. Bank 20 Chy. 24. Porter's Laws of Ins., 323-328.

² 58 Vic. c. 22 (B. C.) ³ *Id.*

was the same as if they were assignees of a policy effected with the mortgagor, and that the payment to the mortgagees discharged the mortgage.

Held also, that the company were not justified in paying the mortgagees without first contesting their liability to the mortgagor and establishing their indemnity from liability to him, not having done so they could not, in the present action, raise any questions which might have afforded them a defence in an action against them on the policy.

In the result the decision of the Court of Appeal (15 App. R. 421) and of the Divisional Court (14 O. R. 322) was affirmed.¹

190. Insurance money must be applied for the benefit of the mortgagee.—Promissory notes for the purchase money of goods were secured by a chattel mortgage given on behalf of the purchasers containing a covenant to insure for the benefit of the mortgagee, who discounted the notes with the plaintiffs and assigned the chattel mortgage, but did not transfer the insurance to them, the loss under which was payable to himself. The policy was afterwards renewed by the purchasers' firm, but it did not appear that the renewal was assigned to the mortgagee, or the loss made payable to him. Subsequently a fire occurred and the purchasers' firm assigned the insurance money to the plaintiffs, with whom they kept an account, as security for their general indebtedness, and the plaintiffs received and applied it on the notes above mentioned, but afterwards sought to apply it in payment of other indebtedness of the purchasers.

Held, that the plaintiffs were bound to apply the insurance money for the benefit of the mortgagee, who was the equitable assignee of the policy under which the money was paid, and entitled to have it applied in payment of the notes, to pay which, as between him and the purchasers, it was primarily applicable, and the plaintiffs took the money, subject to the equitable rights of the mortgagee, of which they had notice.²

191. Loss payable to mortgagee — Consolidation.—The owner of a parcel of land mortgaged the same, and subsequently mortgaged it to the same person again, the second mortgage containing lands, on which were buildings, and also a covenant to

¹ Supreme Court of Canada, *The Imperial Fire Ins. Co. v. Bull*, 18 S. C. R., 697.

² *Western Bank v. Courtemanche*, 27 O. R., 213.

insure. The mortgagor subsequently made an assignment for the benefit of his creditors and the equity of redemption was sold by his assignee, the purchaser covenanting to pay off the mortgages. The purchaser then insured the buildings included in the second mortgage in his own name, "loss, if any, payable to the mortgagees as their interest might appear," subject to the conditions of the mortgage clause.

A fire took place by which the buildings in the second mortgage were destroyed, the insurance moneys payable being more than sufficient to pay the balance due on the second mortgage, which was in default, and the mortgagee claimed the right to apply the surplus in payment of the first mortgage, which was also in default.

Held, that the mortgagees were not entitled to consolidate their mortgages so as to be paid the whole of the insurance moneys, but were restricted to the right to recover the amount remaining unpaid on the second mortgage.¹

191a. Loss payable to mortgagee—Assignment of mortgage—Subrogation.—A contract of fire insurance is a contract of indemnity merely personal, and if the loss is made payable to a mortgagee it does not enure to the benefit of an assignee of the mortgage, who takes the mortgage without an agreement with the insurance company.

The policy having been forfeited by the insured, and the mortgagee to whom the loss is payable having assigned his mortgage before the fire occurred, the mortgagee could not maintain a suit for the benefit of his assignee.

192. Mortgage clause as adopted by Canadian Fire Insurance Companies.—"It is hereby provided and agreed that this insurance, as to the interest of the mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

It is further provided and agreed that the mortgagees shall at once notify said company of non-occupation or vacancy for over

¹ *Re The Union Ass. Co.*, 23 O. R., 627.

Kase to the Use of Hadley v. Hartford Fire Ins. Co. (N.J.S.C.), 17 New Jersey Law Journal (1894), 308.

thirty days, or of any change of the ownership or increased hazard that shall come to their knowledge ; and that every increase of hazard, not permitted by the policy to the mortgagor or owner, shall be paid by the mortgagees on reasonable demand from the date such hazard existed, according to the established scale of rates, for the use of such increased hazard during the continuance of this insurance.

It is also further provided and agreed that whenever the company shall pay the mortgagees any sum for loss under this policy, and shall claim that, as to the mortgagor or owner no liability therefor existed, it shall at once be legally subrogated to all rights of the mortgagees under all the securities held as collateral to the mortgage debt, to the extent of such payment, or, at its option, the company may pay to the mortgagees the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage, and all other securities held as collateral to the mortgage debt, but no such subrogation shall impair the rights of the mortgagees to recover the full amount of their claim.

It is also further provided and agreed that in the event of the said property being further insured with this or any other office, on behalf of the owner or mortgagee, the company, except such other insurance when made by the mortgagor or owner shall prove invalid, shall only be liable for a rateable proportion of any loss or damage sustained.

At the request of the assured, the loss, if any, under this policy, is hereby made payable to.....as..... interest may appear, subject to the conditions of the above "*Mortgage Clause*."

193. Mortgage clause, effect of.—M., who had mortgaged his property to the plaintiffs, subsequently on the 2nd April, 1881, insured with defendants, loss, if any, payable to plaintiffs. Attached to the policy on a printed slip dated 29th May, 1881, was the following clause :—"It is hereby agreed that this insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of the policy." A loss having occurred the defendants disputed their

liability and the matter was referred to an arbitrator, who awarded in favor of the plaintiffs, after refusing to admit evidence for the defendants, that the policy had been obtained by fraud.

Held, that the above clause provided only against future acts, that the defendants did not thereby guarantee the policy to the plaintiffs as indisputable, and therefore that they were not debarred from setting up that the insurance had been effected by fraud, and the case was remitted to the arbitrator for the admission of such evidence.

Held also, that the clause did not amount to a new insurance in favor of the mortgagee.¹

193a. Mortgage clause, effect of.—On 21st February, 1879, A. B. & Co., the plaintiffs, gave a mortgage on a mill property covenanting to insure which they did in the R. company by policy dated 19th March, 1879. On 10th March, 1879, A. left the firm. On 1st March, 1880, mortgagees, having received no renewal receipt of the above policy, insured the property in the U. Company in the name of the plaintiffs. This U. policy provided that the loss should be payable to the mortgagees and the insurance as to the interest of the latter should not be invalidated by any act of the mortgagors, and that if the mortgagors did any act invalidating the policy, and the insurers should pay the amount of the policy to the mortgagees, they should be subrogated to the rights of the latter, or might pay the whole of the mortgage debt and obtain an assignment of the mortgage. There was no written application for the U. policy. The R. policy was simply handed the insurers and from it they drew their policy, which had the statutory conditions only. No representations were made to them in any other way. The premium was paid by the mortgagees who collected it from the plaintiffs, the latter having taken no part in effecting it. On 14th March, 1881, the mortgagees wrote a letter to the plaintiffs in which they represented the U. policy as indisputable.

A fire having occurred, the U. Company paid the mortgagees the amount of the loss, which more than covered the amount due on the mortgage of which they took an assignment. The evidence showed that at the time of effecting this policy there were certain insurances on the property, and also certain mortgages of which the U. Company were not informed, and to which they never

¹ *Omnium Securities Co. v. Canada Fire Mut. Ins. Co.* 1 O. R. 494.

assented. The plaintiffs now suing on the U. policy claimed to have the mortgage discharged and the balance of the insurance money paid to them and the U. Company counterclaimed for the amount due on the mortgage :—

Held (reversing the decision of Ferguson J.), that the non-communication of A.'s retirement from the firm was not a breach of statutory condition No. 1, because A., though he had retired, retained an insurable interest both as liable to the covenants in the mortgage and as still retaining the right to redeem the mortgage and, moreover, even if A. had no interest at all the surviving partners could recover according to the extent of their interest.

Semble, that even if notice of the change had been of moment, yet, since the evidence showed that the matter of the policy, as between the mortgagees and the U. Company, was left to the underclerks to deal with, and that a clerk of the mortgagees informed a clerk of the U. Company of the change in question, a jury might properly find that notice of a change was communicated to the U. Company.¹

Held, further, that the non-communication of other mortgages, subsequent to that to the plaintiffs, was not a breach of statutory condition No. 1, because such non-communication will not, apart from stipulation, irrespective of the nature and amount of the other mortgages, and without any imputation of fraud, avoid a policy ; and also because the plaintiffs were not bound unasked to state the exact nature and extent of the interest to be insured, and there was at least contributory negligence on the part of the insurers, who might be regarded as having waived information as to the mortgages.²

Held, further, that the fact of there being two prior insurances unassented to was not a breach of statutory condition number 8, because the evidence showed the U. policy was to take the place of the R. policy, and of the prior insurance one was assented to on the face of the R. policy and the other had been taken in substitution for another, which also appeared as assented to on the R. policy. It was the duty of the U. Company to have properly issued their policy, agreeing to take the position of the R. Company, as also it was the duty of the mortgagees to see the policy properly issued.

¹ *Klein v. Union Fire Ins. Co.*, 3 O. R. 234.

² *Ib.* *Samo v. Gore Dist. Mut. Ins. Co.*, 1 A. R., 545 followed.

Held, further, that the letter of 14th March, 1881, contained representations which the mortgagees were bound to make good, especially as the U. Company acted as agent for the plaintiffs in effecting the policy.

Held, further, that the claim of the U. Company to foreclose should not be entertained, for the U. Company could not take the advantage of their own default, in not making the formal entry of assent to the prior insurances on their policy, to bring into play the subrogation clause for their own advantage.¹

Held, lastly, on the whole case, it should be declared that the mortgage had been paid, and the proper discharge should be executed and the mortgagees should pay the balance of the insurance money to the plaintiffs, with interest, with costs of suit to the plaintiffs, as against both defendants, but without prejudice to the defendant litigating their respective liabilities as between themselves.

Quaere, whether upon the facts stated in the report the plaintiffs were not entitled to recover on the ground of the compromise made between the parties.²

194. Covenant to insure in mortgage deed—Effect of.—It has been held that the usual covenant to insure contained in a mortgage executed under the Ontario Act respecting short forms of mortgages operates as an equitable assignment of the insurance when effected.³

Under a covenant in a mortgage the mortgagor effected an insurance in the Queen Insurance Company for \$6,000 and transferred the policy to the mortgagee. The mortgagee, not having received the renewal receipt within three days before the expiration of the policy, as required by the mortgage, effected an insurance of \$5,000 with the Imperial Insurance Co., and by a subsequent arrangement the Queen policy was allowed to lapse.

In 1880 a fire occurred and an amount was paid by the insurance company, which was applied on the mortgage, reducing it to \$1,750, and the policy was reduced to that amount. The policy was then cancelled and an application made by the investment company for said sum. The policy was to be, and was, issued in the name of the owner, stated in the application to be

¹ Klein v. Union Fire Ins. Co. *supra*. ² *Idem*.

³ Greet v. Citizens Ins. Co., and Greet v. Royal Ins. Co., 5 A. R., 596.

the plaintiff. The premiums were paid by the plaintiff. Attached to the policy was the mortgage clause whereby the insurance, as to the mortgage clause only, should not be invalidated by any act of the mortgagor; and if payment was made to the mortgagees, and, as to the mortgagor, no liability therefor existed, the company, as to such payment, should be subrogated to the mortgagees' rights under all securities held collateral to the mortgage debt.

In 1882 a fire occurred and the insurance company paid the investment company the \$1,750. The plaintiff claimed to have his mortgage discharged, but the insurance company disputed this, setting up that plaintiff had no claim under the policy, and that, having paid the investment company, they were subrogated to their rights.

Held, that the plaintiff was entitled to the benefit of the money paid and to have his mortgage discharged, unless he had done something to forfeit his rights; but that there was no forfeiture, certain grounds of voidance set up by the defendants not being tenable.¹

195. Mortgagee not bound to make proofs of loss.—A mortgagor insured his mill against fire with the defendants, the policy being payable on its face, to the extent of one-half to the mortgagee. Attached to the policy was a separate slip called a "mortgage clause," by which it was provided that the insurance, as to the interest to the mortgagee only therein should not be invalidated by any act or neglect of the mortgagor; and, also, that whenever the company should pay the mortgagee any sum for loss under the policy, and should claim that, as to the mortgagor, no liability existed therefor, it should, to the extent of such payment, be subrogated to all the rights of the party to whom such payments should be made. Proofs of loss were not made by the mortgagor and mortgagee until within sixty days of the end of a year after a fire had occurred; and within sixty days after the proofs were delivered, an action was commenced by the mortgagor and the representative of the mortgagee.

Held, affirming the judgment of Boyd, C., at the trial, that the mortgagee was not bound as the assured under statutory con-

¹ Bull v. North British Can. Invest. Co., 14 O. R., 322, 15 A. R., 421. Klein v. Union Fire Ins. Co., 3 O. R., 234 followed, and Omnium Securities Co. v. Can. Fire & Mar. Ins. Co., 1 O. R., 494, observed upon in the Court of Appeal.

dition 12 to make proofs of loss, and that here the person assured, the mortgagor, was the person to make them, under conditions 12 and 13.

Held also, that the neglect of the assured to make the proofs of loss in proper time so that the sixty days thereafter might expire before the termination of the year after the loss, within which an action had to be brought under condition 22, was a neglect, from the consequence of which the mortgagee was relieved by the mortgage clause, and that, as far as he was concerned, the action was not brought too soon.

Held also, that the words, "shall claim that as to the mortgagor no liability exists," in the mortgage clause, meant "and as to the mortgagor no liability exists," and that, as the policy was valid at the time of the fire, and nothing was shown to have taken place to render it invalid, there was a liability to the mortgagor; that the condition 22 barred the remedy and not the right, and the defendants were not entitled to subrogation.

Held also, that the mortgagor was bound to make the proofs in such time that the sixty days would elapse before the expiration of the year limited for bringing the action, and his remedy as to the other half of the policy was barred.

196. Insurance by mortgage creditor is for his own security only.—It has been held in Quebec that the insurance by a mortgage creditor of the house or building subject to his mortgage is not an insurance of the building *per se* but only of the creditor's security for the payment of his debt. To support an action on the policy, there must be a loss existing at the time of action brought. If, before action brought, the premises be rebuilt, whereby the creditor's security is restored, he cannot recover as for a loss.¹

197. Mortgagor not entitled to claim from assignor the discharge of the mortgage.—In the case of an assignment, with the consent of the mortgagor, of a mortgage, which contained a covenant by the assignor to transfer to the assignee as collateral security a certain policy of insurance, then held by the assignor on the buildings existing on the property mortgaged, it was held that the failure by the assignee to secure such transfer and the conse-

¹ *Anderson v. Saugeen Mut. Fire Ins. Co. of Mount Forrest*, 18 O. R., 355, and see *Howes v. Dom. Fire & Mar. Ins. Co.*, 8 A. R., 644, *infra*.

² *Mathewson v. Western Ins. Co.*, 4 L. C. J. 57, 10 L. C. R. 8, and see *infra* § 204.

quent reception by the assignor of the insurance money under the policy, would not entitle the mortgagor to claim from the assignor the discharge of the mortgage.¹

198. Loss payable to mortgagee.—As we have seen when a fire policy taken out by the owner of real property has been made to read, that the loss, if any, is payable to certain persons named “as mortgagees to the extent of their claims” such persons become thereby the parties assured to the extent of their interest as mortgagees and their right and interest cannot be destroyed or impaired by any act of the owner of the property.² But would this apply only to acts subsequent to said declaration? If the conditions of the policy had been infringed by the assured prior to the declaration, (by double insurance or otherwise) it might be contended that such infringement could be invoked against the mortgagee.³ The contrary view has, however, been taken recently in the United States where it is said that the company’s assent to an assignment makes a new contract and precludes their raising against the assignee defences which they have against the assignor.⁴ The Civil Code regulates transfers in Quebec.⁵

In the case of *Black v. National Ins. Co.*, above cited, Mr. Justice Ramsay, who was one of the dissentient judges, described this decision as not compatible with any sound principle. “It alters the obligation of the insurer, and exposes him to perils which the contract he has entered into, on its face, does not contemplate.”

As the decision above referred to was a reversal, and there were two dissentients, authority on the point was about evenly divided, Justices Mackay, Monk and Ramsay being in favor of the insurer, and Chief Justice Dorion and Justices Tessier and Sicotte being in favor of the mortgagee.

Nearly ten years later the question again presented itself in *National Assurance Co. of Ireland & Harris*.⁶ Here the loss, if any, was made payable to a person named in the policy, and it was held that the rights of this person were not affected by acts of the

¹ *Robert & Macdonald* 19 L. C. J. 90.

² *Q. B. Black & National Ins. Co.* 24 L. C. J. 65 and 3 L. N. 29, and see *National Ins. Co. & Harris* M. L. R., 5 Q. B. 345 *infra*.

³ See in support of this view *supra* § 192a, *Omnium Securities Co. v. Can. Fire Mut. Ins. Co.*, 1 O. R. 494.

⁴ *Beach* 83 § 680 & seq. ⁵ C. C. L. C. 1571. ⁶ M. L. R. 5 Q. B. 345.

insured which would have the effect of voiding the contract as regards the insured, such as an assignment of the property without the permission of the insurer. It was also held that the creditor to whom the loss was payable might make the preliminary proof of loss in his own behalf, notwithstanding a stipulation in the contract that the proof of the loss should be made by the insured, although the loss should be made payable to a third party.

This judgment, which was made to rest upon *Black & National Ins. Co.*, extends and broadens the scope of the earlier decision. It would appear that the fact of a company consenting to an assignment of the loss is equivalent to a renunciation on its part of all the conditions of the policy. For example, the property insured may be assigned to some one whom the company would have utterly refused to insure, but the company has no redress during the remainder of the period for which the premium has been received. The property may be converted from a dwelling into a saloon, but the contract holds good. To use Mr. Justice Ramsay's words, the obligation of the insurer is altered, and he is exposed to perils which the contract he has entered into, on its face, does not contemplate.¹

The equal division of opinion on the former case has been pointed out, and this equality is still more marked when the two cases are taken together. The opinions stood : For the insurer : —Justices Mackay, Monk, Ramsay, Cross, Doherty, 5. Against the insurer :—Chief Justice Dorion, and Justices Tessier, Bossé, Papineau and Sicotte, 5. It happened that the French-speaking judges were of one opinion and the English-speaking of the other. The amount involved in *National Assurance Co. & Harris* was too small to give a right of appeal either to the Supreme Court or to the Judicial Committee of the Privy Council and there has been no pronouncement as yet by any higher authority than the Court of Appeals as to the law in Quebec on this point.

199. The hypothecary claim must be secured by the property.—A mortgage creditor insuring may sometimes not recover the amount insured, because of the existence of mortgages anterior to his, covering more than the value of the land and buildings mortgaged. A hypothecary right is often worth nothing. But insurers, to get free from paying an insured mortgage creditor's

¹ 13 L. N. 89.

loss alleged, must prove clearly the valueless character of the insured's right of *hypothèque*, by proof of the value of the land and buildings mortgaged, and of the quantity of mortgage claims against it, anterior in date to the insured's.

In *McGillivray v. Montreal Ass. Co.*,¹ one of the judges said that where a mortgagee insures to secure his mortgage claim, it is necessary for him to show that his claim was worth something; for if anterior claims were undoubtedly larger than enough to eat up the whole value of the property insured then he could lose nothing by its destruction, and having lost nothing had no claim for indemnity, and so if, after a fire, enough value remains in the thing insured the mortgage creditor ought not to get the policy amount.²

200. Fire insurance as security for loan.—Judge Mackay points out that insurance is often effected by an owner debtor as a security for a loan. The insured would do well to stipulate that the insurance is for the creditor if the debt be subsisting at the time of a fire happening, but for his own after the debt is paid. A borrows £100 from B and promises to insure for B's benefit. The insurers take the premium. The policy reads to secure B. Afterwards B is repaid by A who, not examining the policy, is tranquil and even pays a renewal premium. The house insured is afterwards totally destroyed by fire. The insurers lose nothing.³

201. Chirographary creditors.—A chirographary creditor cannot insure his debtor's house in his own name, there is not "*matière à assurance*;" but he can insure it in the name of his debtor, and then on loss the indemnity will be distributed *par justice*; the insured is held *negotiorum gestor* of the debtor in making the insurance.

But the premium in such case cannot be fastened on the debtor. And whereas the debtor may ratify and make the insurer pay if loss happen, he may refuse, where all goes well and no fire occurs, to ratify the *negotiorum gestor's* doings.⁴

202. Mortgagee must stipulate to have benefit of insurance.—A mortgagee stipulating that the mortgagor shall insure the mortgaged property, should stipulate that he is to have the benefit of the insurance; else, after a fire and assignment by

¹ 19 L. C. R. 488. ² 13 L. N. 205. ³ *Ib.* ⁴ 13 L. N. 206.

the insured, the mortgagee will in vain notify the insurance company of claim by or for him.¹

203. Loss payable to mortgagee—Breach of condition of policy.—Judge Mackay says that where an insurance is effected by A, and “in case of fire the insurance money is to be paid to C, a mortgage creditor of A, and A subsequently breaks a condition about other insurance and so avoids the policy, C can get nothing. The full rights in and to the policy were never C’s; he was only appointed to have any money claims that A could possibly maintain,² but this is overruled³

204. Case where mortgagee’s interest ceases.—In Quebec, where a mortgage creditor insures the house (mortgaged) of his debtor, this is held not to be insurance of the house *per se*, but of the creditor’s security; so that, though the house be burned, if before the mortgagee sues the insurer, it have been rebuilt by the mortgagor, the mortgagee cannot recover as for loss by the fire. The rebuilding by the debtor is held to free the insurer from obligation to pay.⁴

*Mathewson v. Western Ins. Co.*⁵ was an action to recover £400, amount of a policy of fire insurance. In 1844, John Mathewson and wife sold a lot of land to C. P. Ladd, for a price in payment of which Ladd constituted a *rente* in favor of vendors of £60 per annum, for which the land was mortgaged. Ladd further bound himself to erect a house on the lot, of the value of £400, to insure it and to transfer the policy to the vendors as extra security till the *rente* should be redeemed. He did build, but never insured. Mathewson and his wife assigned the *rente* to the plaintiff who, in March, 1853, effected the insurance for £400 on which the action was brought. In June, 1853, the house insured was destroyed by fire. It was rebuilt, by Ladd, immediately, and before plaintiff commenced his suit. The defendants contended that they could not be held liable to pay; that plaintiff had suffered no loss, and that the rebuilding of the house before the institution of the action relieved them from liability.

¹ *Lees v. Whiteley*, 2 L. R., Eq. 143. The general rule is that the mortgagee has no right to the benefit of a policy taken by the mortgagor unless it is assigned to him. But if mortgagor agree to insure for the mortgagee, the latter has an equitable lien on the money due on a policy taken by mortgagor. *Angell*, § 162, and see 13 L. N. 206. ² 13 L. N. 206. ³ *Supra* § 198.

⁴ 13 L. N. 207, and see *supra* § 196. ⁵ 4 L. C. J. 57 *supra* § 190.

The Court held, that an insured must be under loss at the time his action is brought (argument from *Hamilton v. Mendes*); that in the present case plaintiff's security was as good as it had been before the fire; that he had suffered no loss; and that under the circumstances the action was to be dismissed.

The Court cited also, in support of its judgment, from *Parsons Merc. Law*, p. 509: "The mortgagee has an interest only equal to his debt, and founded upon it; and if the debt be paid the interest ceases, and the policy is discharged. And if a house insured by a mortgagee were damaged by fire, even considerably, or perhaps destroyed, it might be doubted, on what we should think good grounds, whether he could recover, if it were proved that the remaining value of the premises mortgaged was certainly more than sufficient to secure his debt and all possible charges."

With respect to this case, it may be remarked that the rebuilding was performed by the debtor; it might have been done, at his request, by third persons, builders, and for credit, these persons observing formalities of the law of Quebec, and so securing privilege for their outlay. Had this been the case the insurance company would no doubt have been condemned in favor of Mathewson.

Mathewson, when he insured, had security, by the land and by the building. Had Ladd not rebuilt, it would have been going far to say that the insurer was not liable, on plea that the land was worth the sum insured. It might not continue to be so. It might perish, yet the *rente* continue to be payable, and Ladd might be utterly bankrupt. The intention of both insurer and insured might fairly be supposed to have been that if the house as a security for the debt disappeared the insurer would pay.

A insures to the extent of £400 a house, and transfers the policy to B, who holds a mortgage on it for £400. Fire happens afterwards, and A files all particulars, showing a loss of £500. B afterwards settles with the insurers and discharges them, for £200 paid. A complains, and may, justly; if A and B were creditors of thing *commune*, and B made remission of part, he would be held to indemnify his associate for the hurt caused him by the remise.¹

205. Insurable interest continuing after mortgagor has sold property.—In Quebec, a mortgagor of property to secure a

Duranton XI 190, 13 L. N. 207.

debt due by him will continue to have an insurable interest herein, even after he has sold the property subject to the mortgage.

A mortgagor constantly sells property in Quebec charging the purchaser to pay off the mortgage debts, and balance to him. Such seller (mortgagor originally) may insure ; he plainly has interest ; his vendee may become bankrupt, and the buildings on the land may be burned.¹

The same doctrine holds good in Massachusetts.²

208. Claim paid by company in excess of mortgage goes to debtor.—In a case where a creditor insured his debtor's house, the sum payable by the company after a fire being more than sufficient to pay the creditor, the debtor, a stranger to the contract, claimed and received the difference, the insured hypothecary creditor being held *negotiorum gestor* of the debtor for the excess. The policy did not mention the amount of the mortgage debt, and the insured was held to have acted in his own interest and the debtor's.³

207. Life insurance—Lien for premiums paid.—A policy of insurance was assigned by L. to S. as a security for a judgment debt due from L. to S. on which S. had created a charge in favor of V. The premiums were paid by S. during his life and after his death by his administrator, at first of his own authority and afterwards by the direction of the court in an administration suit.

Held, that as against V. the administrator of S. had a lien upon the money payable under the policy for the amount of the premium paid by him, but not for the premium paid by S.⁴

And where a mortgagor of policy became bankrupt but continued to pay premiums, held that they were in the nature of salvage moneys sought to be repaid with interest at 4 per cent out of the policy moneys.⁵

207a. Life insurance—Lien for premiums paid.—A policy of insurance on the life of G. granted to a trustee for her, was assigned to trustees upon trust to invest the proceeds at the death of G. for the benefit of C. for life, for her separate use, without power of anticipation, and after her death upon trusts as she should appoint,

¹ 13 L. N. 208. ² Wilson v. Hill, 3 Metcalfe, 66. ³ 13 L. N. 211.

⁴ Norris v. Caledonian Ins. Co, 8 Eq. 127,

⁵ Shearman v. British Em. Mut. Life Ass. Co. 14 Eq. 4.

and in default of appointment for the persons who would be entitled to her personal estate. The trustees had power to pay the premiums. Notice was given to the insurance company of the assignment. C. subsequently, by a deed to which G. was a party, appointed the policy and the moneys to become due thereon to the plaintiffs to secure the repayment of moneys (with interest at five per cent) advanced to G. for the benefit of herself and C. and children. Notice was given to the surviving trustees of settlement and to the insurance company. The plaintiffs had, in consequence of the trustee and others interested in the policy refusing to pay them, paid the premiums and kept the policy on foot. On the death of G. the assurance company paid the policy moneys to the trustees who refused to pay the plaintiffs the sums due to them. The policy moneys were afterwards paid into court. On bill fyled by the plaintiffs :—

Held, that they were entitled to be repaid at once the moneys which they had advanced for the payment of the premiums with interest at four per cent, and one per cent more on the death of C.¹

207b. Life insurance—Lien for premiums paid.—When a person, not the sole beneficial owner, pays the premiums to keep up a policy of life insurance, he is entitled to a lien on the policy or its proceeds in the following cases ;—(1) By contract with the beneficial owner ;—(2) By reason of the right of trustees to an indemnity out of their trust property for moneys expended by them in its preservation ;—(3) By subrogation to their right of some person who, at the request of trustees, had advanced money for the preservation of the property ;—(4) By reason of the right of a mortgagee to add in his charge any money paid by him to preserve the property.

In no other cases can a lien on a policy for premiums paid be acquired either by a stranger or by a part owner of the policy.²

207c. Life insurance—Lien for premiums paid. E. mortgaged a policy of life assurance to F., and afterwards fyled a petition for liquidation. Resolutions of the creditors were passed under which E.'s friends were to pay 2s. in the pound on the unsecured debts, and the trustee was to assign to a nominee of the

¹ Gill v. Downing, 17 Eq., 316.

² In re Leslie, Leslie v. French, 23 Ch. D. 552.

friends all E.'s property, except the equities of redemption, in the securities held by secured creditors. The terms of these resolutions were carried out and E. obtained his discharge.

Shortly after this agreement D. informed E. that none of the encumbrancers would pay the premium for that year, and E. paid it on the face, as he deposed, of his interest under the agreement. There was no evidence that D. had any authority to enter into any agreement on behalf of F. or that F. had any knowledge of the contract or of the payment by E. F.'s representative, Mrs. F., brought an action to enforce her security, and the policy was sold for much less than the amount of the mortgage.

Held, by Bacon, V. C., that E. was entitled to be repaid out of the proceeds of sale the premiums for 1883 which he had paid, and that the residue must be paid to Mrs. F.

Held on appeal, that E.'s payment of a premium in his character of owner of the equity of redemption could not give him a lien in priority to the mortgage debts; that E.'s belief that he had a valid contract for purchase when he had not, could not give him any advantage as regarded the premium, there being nothing to show that F. knew of the alleged contract of the payment of the premium; that in this state of the evidence no request from F. to pay the premium could be inferred and no equity could be held to have arisen against F. on the ground of acquiescence or lying by; and that the fact that the policy had been preserved by E.'s payment did not give him a right to have the premium repaid, nor give him a lien on the policy for it.

Held, therefore, that the whole proceeds of sale must be paid to Mrs. F. without deducting the premium.

Semble, the maritime doctrine of salvage has no application to the payment of premiums on a policy.¹

207d. Life insurance—Lien for premiums paid.—Under the provisions of a Private Estate Act the trustee of a term of years in certain settled estates, of which W. had been tenant for life, was bound to apply the rents to the estates first in the payment from time to time of the interest upon certain incumbrances existing before the passing of the Act, and subject thereto in the payment from time to time of the interest on sums to be raised by mortgages created under the powers conferred by the Act and of the

¹ *Falcke v. Scottish Imperial Ins. Co.* 34 Ch., D. 234.

premiums on policies of life assurance, constituting the collateral security for the repayment of those sums, the equity of redemption being reserved to W. The rents having become insufficient, the trustee in order to save one of the policies from lapsing paid a premium out of his own moneys. He did this without any request from the mortgagee or from the owner of the equity of redemption of the policy. The life insured having dropped and the proceeds of the policy having been received by the mortgagee :—

Held, that the trustee was not entitled to any lien on the proceeds in respect of the premiums which he had paid, he not being a trustee of the policy. The right of a trustee to be indemnified out of his trust fund for money expended by him in its preservation is strictly limited to the trust fund.¹

208. Life insurance—Salvage premiums—Reimbursement.—

On an assignment of leaseholds subject to a mortgage to an insurance company, which was collaterally secured by a policy, it was agreed that the policy should belong to the vendor, who was to pay the premiums. This he failed to do and the purchaser had to pay several premiums to prevent the mortgage being called in. The policy finally lapsed, but the insurance company *ex gratia* allowed the surrender value, which was less than the salvage premiums, and wrote the amount off the mortgage debt. The vendor claimed to have a lien on the leasehold for the amount, and a declaration that he as surety stood in the place of the mortgagees of the policy. Claim dismissed.²

209. Life insurance—Mortgage by deposit.—In 1847 A. deposited a policy on his own life with B. as security for an advance of money, and died in 1874 insolvent and no administration was taken out to his estate. In 1875 B. proved A.'s death to the satisfaction of the insurance company and demanded payment of the policy moneys which were insufficient to pay the debt, but the company refused to pay him without the consent of the legal personal representative of A. In 1878 B. died, and an action brought by his executors against the company claiming a declaration that they were entitled to the policy moneys and payment with interest from the time when the demand of payment was made.

¹ In re Earl of Winchelsea's Policy Trusts, 39 Ch. D. 168.

² Lippett v. Stuart, North v. J. (1891) W.N. 112.

Jessel, M. R. (1), held that the company was justified in refusing to pay over the policy moneys without the consent of A.'s legal personal representative ;—(2) dispensed with the legal personal representative of A. under the Chancery Amendment Act 1852, 15 and 16 Vic. c. 86, s. 44 :—and (3) ordered payment of the policy moneys, with interest at four per cent from the date when demand of payment was made.

On Appeal on the question of interest :—Held, that, as the default or delay in payment of the policy moneys had been caused not by the company but by B.'s neglect to clothe himself with a legal title to the money, interest did not commence to run till the order for payment of the principal was made : *Crossley v. City of Glasgow Life Insurance Co.* (4 Ch. D. 421) overruled on this point.

Quaere, whether, in an action by an equitable mortgagee of a life policy against the insurance company claiming payment of the policy moneys, the court has jurisdiction under the 44th section of the Chancery Amendment Act, 1852, to dispense with the legal personal representative of the insured.¹

209a. Life insurance—Mortgage by deposit.—In an action by an equitable mortgagee of a policy of insurance against the insurance company for payment of the policy money, the court had jurisdiction under the 44th section of 15 and 16 Vict. c. 86, to dispense with a legal personal representative of the assured where none exists.²

209b. Life insurance—Mortgage by deposit.—S. having effected two policies on his life for the purpose, as he expressly informed the insurance company, of enabling him to give C. a security for a debt which exceeded the amount of the policies, deposited them with C. at the same time asking him by letter to instruct his (C.'s) solicitor to prepare the necessary assignment ; C. however, never took any assignment. S. died insolvent having made a will appointing executors, but no representation was taken out to his estate. C. then gave the company notice in writing of the death, and that he held the policies as security for his debt, and the company acknowledged the receipt of the notice in the terms of the Policies of Assurance Act 1867 s. 6. Proper evidence of S.'s death having

¹ *Webster v. British Empire Mut. Life Ass. Co.*, 15 Ch. D. 169, and see *infra* § 209a.

² *Curtis v. Caledonain Fire & Life Ins. Co.* 19 Ch. D. 534.

been subsequently produced to the company, they wrote to C. that the claim under the policies would be paid at the expiration of the three months, but that the assent of S.'s legal personal representative would be required before settlement. After the expiration of the three months C. being unable to obtain payment of the policy moneys (although his debt was admitted by S.'s executors, and he offered the company an indemnity) brought an action for that purpose against the company, insisting that S.'s deposit and letter constituted an equitable assignment of the policies within the Policies of Assurance Act 1867, and therefore enabled him to give a valid discharge for the moneys.

Held, that there had been no equitable assignment of the policies within the Act, and that the company were justified in refusing to pay him in the absence of S.'s legal personal representative :

Ordered, payment of the policy moneys to the plaintiff after deducting the company's costs, the legal personal representative being dispensed with under the power given to the court by Sect. 44 of the Chancery Amendment Act 1852 (15 & 16 Vict. c. 86) ; also, payment by the company of interest at four per cent from the day which had been fixed by them for the payment of the principal. *Wolfe v. Finlay* (6 Hare 66) disapproved of.¹

209c. Life insurance—Mortgage by deposit.—An agreement in writing to execute on request an effectual mortgage of a policy of insurance deposited at the time of the agreement as security for a loan, is not an "assignment" of such policy within the meaning of the Policies of Assurance Act 1867.—Accordingly, notice to the assurance company of such an agreement does not give under that Act any priority over a prior equitable mortgagee who has given no notice but has possession of the policy. The holder of a policy of insurance on his own life deposited it with A. by way of equitable mortgage to secure a loan. A. retained the policy, but gave no notice to the company. B. afterwards, in ignorance of this prior mortgage, agreed to lend money to the policy holder upon a deposit of the same policy, and the policy holder alleging that he had left the policy at home by mistake, and promising forthwith to deliver it to B., took the loan and signed a memorandum that he had deposited the policy with B. and that he undertook on

¹ *Crossley v. City of Glasgow Life Ass. Co.*, 4 Ch. D. 421.

request to execute to B. an effectual mortgage of it. B. gave to the company notice of his loan and memorandum of deposit, and frequently applied to the policy holder for the policy, but the policy holder made various excuses for not handing it over, and died leaving it in possession of A.

Held, that the circumstances of the case were such as to put B. on enquiry at the time of the loan, and to fix him with constructive notice of A.'s security, and that the title of A. as in possession of the policy must prevail over that of B., although B. did and A. did not give notice to the company.¹

209d. Life insurance—Mortgage—Priority.—The Act of 30 & 31 Vict. c. 144, is intended to apply only as between the insurance office and the person interested in the policy, and does not affect the rights of those persons *inter se*. Accordingly, where a first incumbrancer on a policy has not given such notice as prescribed by the Act and a second incumbrancer with notice of the prior charge has given the statutory notice held :—that the second incumbrancer did not thereby obtain priority.²

210. Recent American decisions—Mortgage clause—Effect of.—Property was insured by a policy containing this clause : “Loss, if any, payable to the mortgagee (naming him) or its assigns as their mortgage interest may appear. Mortgage clause attached.” It was written in the body of the policy. Attached to the policy was the mortgage clause referred to, the beginning of which was, “Loss, if any, payable to the mortgagee, or its assigns, mortgagee or trustee, as hereafter provided ;” with other conditions showing that the clear purpose was to regard the interest of the mortgagee as a special object of protection.

The mortgagee, a bank, assigned a mortgage, the same was foreclosed and a sale made to one who made application to the agent of the company for such changes of the policy assigned to him as might be necessary, but was told it was all right as it was. When his action was brought upon the policy, after a loss occurred, the company claimed that the policy was avoided by reason of certain provisions therein that in the event of a foreclosure of mortgage and other things, without their consent, etc., it should become void.

¹ Spence v. Clarke, 9 Ch. D. 137.

² Newman v. Newman 28 Ch. D. 674.

The Illinois Court of Appeals sustained the validity of the policy over this contention. They said : " There is a manifest inconsistency between these provisions (those upon which the defence rested) and those of the mortgage clause as applied to the situation at the time the policy issued. As we have shown, the mortgage clause, which is the latest expression of the contracting parties and must control if there is conflict with other provisions, made the mortgagee the beneficiary, and made his interest and that of the assigns the sole object of protection. When this is considered in connection with the circumstances then existing, it would be unreasonable to apply, for example, the condition that the policy should be void in case of a foreclosure suit being commenced. The very object was to protect one whose interest would probably compel him to bring such suit, and who as a matter of fact, as the records disclosed, was at that time prosecuting such a suit. Again, it provides for the payment of the loss, if any, to the mortgagee or its assigns, which is inconsistent with the provisions against assignments without consent indorsed. The proceeding to foreclose and the purchase at the master's sale were within the provisions of the mortgage clause, and furnished no ground of exemption from liability under the clauses forbidding an assignment of the property etc. above referred to. Such proceedings must have been contemplated when the policy with this clause attached was issued ; and if there could be any doubt as to whether they are within the scope of the contract of insurance thus made, the fact that the company, through its agent, so expressly disclosed and, although cognizant of the situation, did not cancel the policy, but retained the unearned premium without objection must, under numerous precedents of undoubted value and authority, estop the company from making the defence."¹

211. Contract in the interest of mortgagee.—A covenant in the mortgage held upon certain property was, that the mortgagors should insure it for the benefit of the mortgagee, in case of their failure to do so the mortgagee might insure it, adding the cost of insurance to the mortgage debt.

As to what a mortgagee might do in such a case, the Supreme Court of Wisconsin has said : " To strengthen his security for the mortgage debt by an insurance upon the mortgage property,

¹ German Ins. Co., of Freeport v. Churchill (1887) 26 Ill. App., 206.

two methods were open to the mortgagee. He might have taken a policy directly to himself, insuring his mortgage interest alone if he could find an insurer willing to issue such a policy, or he could obtain a policy running to the mortgagors, stipulating that the loss, if any, should be paid him as his interest should appear. Perhaps such a policy would not be an insurance of the mortgage interest as such, but probably would cover such interest.

Either mode would protect the mortgagee's security under his mortgage, but with this difference: Had the policy run to himself alone, insuring only his mortgage interest, it would not be defeated by an unauthorized insurance upon the same property obtained by the mortgagors, while a policy running to the mortgagors generally would be defeated by such unauthorized insurance.

The policy issued in this case insured the mortgagor against loss, but provided that the loss, if any, should be payable to the mortgagee as his interest should appear. There was a provision that it should be void if the assured obtained other insurance on the property or any part thereof, without consent of the company, etc. The mortgagee paid the premium, the policy was delivered to him and he retained it without objection for nearly a year before the property was burned.

The court held, that this last stipulation was binding upon the mortgagee, and that other insurance without the consent of the company by one of the partners (the mortgagors) of her interest, avoided the policy.¹

212. Insurance for mortgage creditor—Other insurance.—

In a very recent Minnesota case it appeared that the owner of the property had obtained insurance on it under a policy in the form prescribed in that State containing this condition: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the assured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The owner procured certain other insurance which was expressly allowed. Afterwards a loan was procured from a third party, and secured by a mortgage upon the property insured, in which mortgage it was covenanted that the mortgagor would

¹ *Gillett v. Liverpool & London & Globe Ins. Co.*, (1888) 73 Wis. 203.

obtain insurance on the property payable to the mortgagee, or upon failure to obtain it, the mortgagee might insure it and charge the cost to the mortgagor. The representatives of the mortgagee, before the recording of the mortgage, obtained insurance on the property, and after the recording of the mortgage, notified the mortgagor of the fact, and deducted from the amount of the loan transmitted to the mortgagor the cost of the insurance.

The property having been destroyed by fire when the assured brought action, the company claimed by way of defence that the condition above stated as to other insurance had been violated by the taking of the insurance by the agents of the mortgagee, and that a forfeiture of the policy resulted.

In their opinion on the case presented, the Supreme Court restated the established rule, that an avoidance of the policy would not be the effect of any contract of insurance which might have been procured by the mortgagee insuring only his own distinct and separate interest as mortgagee, so that the payment to him under the policy would not have the effect to extinguish the mortgage debt, but only to subrogate the insurance company to his rights as creditors of the assured.

They held, that under the facts the assured could not be said to have procured the additional insurance, but subsequent ratification would have had the same effect as prior authority. They said, however, concluding the opinion, that the inference that the assured consented to or adopted or ratified the additional insurance as one covering its interest as owner, with the legal effect of avoiding the insurance which it had previously procured for its own benefit, is not justified, unless at least the assured either knew that such was the nature of the insurance or had such notice of the fact that, by reason of some duty towards the insured, it was required to make inquiry concerning it.

As we have said, the assured did not know the fact ; and although it might have had reason to suppose it possible, or even probable, that the insurance effected for the benefit of the mortgagee might be in such form as to also insure to the benefit of the assured, yet the assured was under no obligation or duty as respects the insurer to make inquiry respecting that matter. The insurance had been procured from other companies, not by the assured nor by his authority, but by a third party. The mere

failure of the assured under the circumstances to repudiate the action of this third party, acting as agent for, and for the benefit of, another person, the mortgagee, would not amount to an acceptance of the contract so far as it might constitute an insurance of its interest. If the assured was willing to pay for the insurance for the benefit of the mortgagee, as in fact it agreed to do, its relations to the mortgagee did not require it to make inquiry as to the form of the policies. It was enough that the mortgagee, who had taken them out, was satisfied with them. Nor did the circumstances make it the duty of the assured towards the insurer, a stranger to those contracts, to inquire and see to it that the subsequent insurance was not in such form that, if the assured should consent to or ratify the same, it (the assured) might claim some benefit therefrom. It is enough that the assured neither procured such an insurance nor authorized it, nor knew that it had been procured nor even sought or contemplated, so far as appears, any benefit to itself therefrom. The burden of proving ratification was on the insurer, and we think that the case falls short of showing it.”¹

212a. Insurance for mortgage creditor.—The New York Court of Appeals has in a recent case held, that where an insurance policy procured by the owner of the fee provides for the payment of the loss to the mortgagee as his interest may appear, an accord and satisfaction entered into between the insurer and the owner is not a bar to a recovery by the mortgagee from the insurer of his damages, as his right thereto appeared on the face of the policy in which he had vested interest, and which constituted a contract between himself, the owner, and the insurer.²

Follett, Ch. J. for the court said : “ Had this policy provided that in case of loss the damage should be paid to a person having no interest in the insured property, such person would have been a naked appointee, the same as though the damages had been directed to be paid to a bank, or to any collecting agent and the owner could have settled the loss and released the insurer on his own terms. It may be that the same rule would have been applicable as between the insurer and the appointee, had the loss

¹ Church of St. George, of Glencoe v. Sun Fire Office, of London (Minn. 1893) 55 N. W. Rep. 909.

² Hathaway v. Orient Ins. Co. (1892) 134, N. Y., 409.

been payable "to mortgagee (simply naming him)," having an insurable interest which was neither known to nor described by the insurer in its policy. The rights of an appointee, an agent, or the trustee of an express trust, who has no interest in a contract which he may enforce are quite different from those of a person having a vested legal interest in a contract created by the concurrent action of all the parties to it.

The questions decided in *Trader's Ins. Co. v. Roberts*, 9 Wend. 404; *Tillon v. Kingston Mut. Ins. Co.* N. Y. 405; *Grosvenor v. Atlantic Fire Ins. Co.* N. Y. 391, and *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.* 17 N. Y. 401, are not involved in the case at bar, and it is unnecessary to harmonize those and kindred decisions. In the cases cited, the owners of property insured it in their own names, the loss, if any, payable to mortgagees; or the insurance was assigned with the assent of the insurer to the mortgagees for their security, and before a loss occurred, and while the contract of insurance was in part executory, the owner increased the risk or did a prohibited act, or omitted to perform some act required by the policy. The question in these cases was, whether the violation of the contract by the owner was a defence to an action by or for the benefit of the mortgagee. No such question is involved in the case at the bar. The liability of the insurer is admitted, and the question here is, whether the owner of the property and the insurer may, without the concurrence of the mortgagee, effect an accord and satisfaction without the assent of the latter."

"It is a general rule that, where a demand is owned by several by such a unity of interest that all must be joined as parties in a strictly personal action for its recovery, a case of the claim by one of the owners is as effectual as a release of all. But this rule has its exceptions. The owner here was not a necessary party plaintiff to an action for the recovery of the amount due from the insurer, for the whole amount was recoverable by an action brought by the mortgagee individually (*Dakin v. Liverpool & London & Globe Ins. Co.* 77 N. Y. 600), though a joint action by the owner and the mortgagee could have been maintained. *Winne v. Niagara Fire Ins. Co.* 91 N. Y. 185.

In case a claim arises in favor of A. and B. against C. out of a contract entered into by the three to which claim by the contract A. has the prior and B. subsequent right, C. and B. cannot without

the consent of A. effect an accord and satisfaction which will cut off the right of A. *Ennis v. Harmony Fire Ins. Co.* 3 Bosw. 516; *Cromwell v. Brooklyn Fire Ins. Co.* 44 N. Y. 42; *Reid v. McCrum* 91 N. Y. 412; *Baltis v. Dobin* 67 Barb. 507.

In *Cromwell's* case a house and lot had been sold under an executory contract by which the vendee covenanted to insure the house for the vendor's benefit. The vendee went into possession and insured the house under a policy payable to the vendor in case of loss. On the expiration of this policy the vendee took out a new one payable to himself, and during its life the house was burned. The vendor had assigned his interest in the contract, demanded payment of the loss, and forbade its payment to the vendee. The insurer disregarded the demand and notice and paid the amount due under the policy to the vendee. In this action it was held, that the assignee of the vendor was entitled to recover, notwithstanding the accord and satisfaction between the insured and the vendee. The principle upon which this decision rests is, that the vendee and insurer could not effect an accord and satisfaction which would bar an action by one having a prior equitable right to the money due under the contract.

Reid v. McCrum supra is, in its facts, a stronger authority in support of the judgment in the case at bar. In that case the owner of realty mortgaged it, covenanting to keep the buildings insured and the policy assigned to the mortgagee.

Afterwards *McCrum* acquired the title to the property subject to the mortgage and obtained policies of insurance on the buildings which were indorsed by the insurers: "Loss if any payable to—*Reid, mortgagee.*" Subsequently *McCrum* procured the insurers to cancel the indorsement and to write on the policies, 'the mortgagees interest having ceased the loss, if any is now payable to—*McCrum as owner.*' The mortgagee's interest had not terminated and he had no knowledge of the change. After this the buildings were destroyed by fire and the mortgagee began an action to foreclose his security making *McCrum* and the insurers parties defendant, asking that *McCrum* be compelled to assign the insurance and the insurers required to pay the loss to the plaintiff. It was held, that the policies could not be legally changed without the assent of the mortgagee, and that he was entitled to recover the loss from the insurers."

212b. Insurance for mortgage creditor.—In a Wisconsin case there was an award of arbitrators under the provision of the policy relating to such in case of disagreement as to the amount of a loss, and it was contended by the insurer that the appraisal was strictly according to the policy, and the awards were binding and conclusive as to the amount of the loss or damage. The policy in the case was issued to a mortgagor with a provision for payment of the loss to a mortgagee "as her mortgage interest may appear."

It was contended on behalf of the mortgagee that the appraisal was not in compliance with the provisions of the policy, in that the mortgagee was not a party to the award and had no notice thereof. These contentions presented the question to the Supreme Court as to who in such a case was entitled to act in the matter of adjustment of the loss. The court very learnedly and fully, upon authorities, discussed this question, and as an exposition of the law thereon we give such portions of the opinion as are pertinent as follows :

"Nearly all, if not all the authorities cited.....which held that the mortgagee is the sole party in interest to the insurance, and must be represented in the arbitration or other adjustment of the loss, are cases where the direction is to pay the whole insurance to the mortgagee or other third person, who thereby becomes the assignee of the policy and the loss. In this case it could not be known what interest the mortgagee might have in the insurance or what interest in her might appear. First, her interest was not commensurate with the insurance ; second, it was not known what part, if any, of the mortgage would remain unpaid by the mortgagor. It was therefore uncertain what interest the mortgagee had, if any, in the insurance ; and the assured as the mortgagor had at least the controlling interest in it. She was the owner of the property and of the equity of redemption in the mortgaged premises and as much or more interested in paying the mortgage as or than the mortgagee in obtaining the payment. It follows that in all cases where the language of direction is, that the insurance should be paid to the mortgagee "as her interest may appear," the assured mortgagor remains the responsible party, or the party in interest, to control the insurance and the adjustment of the loss. This is the distinction as I understand it, which divides the authorities on the question.

In *Brown v. Insurance Co.* 5 R. I. 394, cited by respondent's

counsel, the direction was "loss or damage payable to the mortgagee." It was held, that this was an unconditional assignment of the policy and the loss, and that the assured or mortgagor had no interest in it, and that it made no difference whether the mortgage money was unpaid or not. It was therefore held, that the mortgagee was entitled to control the adjustment of the loss, or any arbitration for that purpose.

In *Hathaway v. Insurance Co.*¹ 11 N. Y., Suppl. 413, the mortgagor agreed to have the premises insured, and assign the policy to the mortgagee. He obtained the insurance but did not so assign the policy to him. It was held, that the mortgagee was entitled to the insurance moneys as an assignee and must have notice of any adjustment of the loss. The cases cited in the opinion are cases of a full assignment of the policy; and the court held also, that such cases did not conflict with those cited by the counsel on the other side, when the insurance money was payable to the mortgagee "as his interest might appear," or where there was not a full assignment of the policy."

In the case of *Hall v. Association* 64 N. H. 405; s. c. 13 Atl. Rep. 648, the insurance was payable to the mortgagee "as her interest might appear." The assured brought the suit and the defendant pleaded, that he was concluded by an arbitration agreed upon. The court held, that the assured in such a case had the right to sue alone, and that the rights of the mortgagee would be as fully protected in that as if she had been joined in the action and that the assured had the right to do anything within the contract, even to a breach of the conditions and forfeiture. But here the matters of the loss were submitted to referees by an agreement of the parties, and they adjusted them at a sum less than the mortgage debt. The question was, whether the mortgagee was bound by such an award without her consent. It was held, that she was not, because the policy did not provide for an arbitration. If it had so provided, the purport of the decision is that the mortgagee would have been bound. This case is therefore an exception to the authorities cited on the other side, and is against the contention on behalf of the mortgagee. This case is in accord with 2 Morse on Fire Insurance 1122, and *Martin v. Franklin* 38 N. J. L. 140: "That the mere designation of another to whom the insurance is payable, does not alter the contract of insurance in the least. It is still the owner of the property who is insured, and the

¹ *Supra* § 212a.

continued validity of the policy is dependent upon the performance by him of the conditions embraced in it.

It is doubtful whether a case can be found that holds that anything less than a complete and unconditional assignment of the policy will take away the right of the assured to sue on it, and to do any act in respect to the loss, or its adjustment within the provisions of the contract, without consulting the person named in the policy to receive the money after the amount is determined. In all such cases the mortgagee may be said to have a conditional interest in the policy, and it may be proper for the assured to consult him in any adjustment of the loss or even join him as a party plaintiff as in *Winne v. Insurance Co.* 91 N.Y. 185, but it is neither imperative nor necessary. The owner of the premises has an insurable interest and he is the assured, and the only party to the contract and personally bound by its conditions and he has the power to do anything within the terms of the contract with or without the consent of the mortgagee. 1 Wood of Fire Insurance 299.

The court reviews and comments upon *Thatch v. Insurance Co.* 11 Fed. Rep. 29; *Grosvenor v. Insurance Co.* 17 N. Y. 391; *Perr v. Insurance Co.* 61 N. Y. 214; *Brunswick Saving Inst. v. Commercial Ins. Co.* 68 Me. 313; *Loring v. Insurance Co.* 8 Gray 28; *Franklin Sav. Inst. v. Central Ins. Co.* 119 Mass. 240; *Amazon Ins. Co.* 125 Mass. 431; *Nevins v. Insurance Co.* 25 N. H. 22; *Blanchard v. Insurance Co.* 33 N. H. 9; *Baldwin v. Insurance Co.* 60 N. H. 164; and *Pupke v. Insurance Co.* 17 Wis. 378, concluding with the holding that the assured had the right and power to enter into the appraisal or arbitration according to the terms of the contract without notice to the mortgagee and without her approval.¹

212c. Policy payable to "creditor as his interest may appear"—Waiver of conditions by payment into court—Creditor must show extent of his interest.—The life association in this case paid the money due upon the policies it had issued into court, and the action against it was discontinued as to the association, leaving the parties presenting conflicting claims to the fund to have their rights settled by the court.

The policies were issued to secure a creditor the debt due him

¹ *Chandos v. Am. Fire Ins. Co., of Phila.*, (Wis. 1893) 54 N. W. Rep. 390.

from insured, and were payable to him as a "creditor as his interest may appear." They contained a clause that a claimant must show an insurable interest; that a creditor could not recover more than his *bona fide* indebtedness with interest, and that as to all amounts in excess thereof the policy should be void.

The complaint of the executrix of deceased, after an unsatisfactory showing as to the exact state of accounts between deceased and the creditor, was dismissed on motion of the latter, and a decree entered in his favor for the whole sum.

The Supreme Court of New York in General Term held that the dismissal of the complaint was an error, and upon the theory that the trial judge, considering the effect of the clause above quoted from the policy, concluded that the creditor alone would be entitled to the amount, considered the effect of that clause upon the rights of the parties, as the case stood upon the proofs, in the following language:—"It is true that, had the association remained a party and defended, making the point that the executrix of deceased had no interest in excess of what was the actual indebtedness, this condition in the policy as to such association might be available. We say advisedly, 'might be available,' because it is not entirely clear that, as against her, resort could be had to this condition. Its evident purpose is to protect the company against a creditor's speculating upon the life of a member beyond what is actually due him. Where, therefore, the assignment from a member to one claiming to be a creditor is absolute in form, thus leaving no claim in favor of the member, the company is only liable to the creditor to the extent of his *bona fide* debt. That this must be the correct view is apparent if we consider the results to the member of the payment to the creditor of his entire indebtedness before the policy matured by death or limitation of time. It could not be held that, because there was no indebtedness, the association would be free from any obligation to pay the member.

The true construction, we think, therefore, of this provision is, that it was intended to protect the company against creditors or other persons speculating in policies of the company issued to members. But the company, by payment into court of the full amount of the policy, having waived not only that condition but all others, such condition was not available in the creditor's behalf to defeat the right which the executrix might have in the policies.

In other words, the life association alone had the right to insist upon that condition, and its waiver and payments do not give the creditor the right to take the benefit of it and claim the surplus over this debt on the ground that plaintiff had violated or failed to perform any condition that was a right in favor of the company that was not assigned to the creditor."

In such a case the opinion of the court further was that the burden of showing the extent of his interest was upon the creditor, after the plaintiff had made a *prima facie* case in her favor upon production of the policies of insurance.¹

212d. Contract subject to creditors' claims.—The contract is a chose in action and the assured's interest in it can be reached by his creditors.²

¹ *Elsberg Meux v. Ilwards* (1892), 66 Hun. 28.

² *Clarke on Ins.* § 77, and see *Weekes v. Frawley*, 23 O. R. 235.

CHAPTER VIII.

INSURANCE FOR THE BENEFIT OF WIFE AND CHILDREN, ETC.

213. GENERAL REMARKS ON THE LEGISLATION FOR THE PROTECTION OF PREFERRED BENEFICIARIES.

214. INSURANCE FOR THE BENEFIT OF WIFE — PREDECEASE OF WIFE—SECOND MARRIAGE—NO CHANGE OF DIRECTION AS TO PAYMENT—EXCLUSION OF GRANDCHILDREN—POLICY NOT ASSIGNED—PROPERTY BEQUEATHED TO DAUGHTER—POLICY IN FAVOR OF DAUGHTER—BENEFICIARY PREDECEASED—BEQUEST IN TRUST FOR CHILD.

215. INSURANCE FOR THE BENEFIT OF WIFE AND CHILDREN—APPOINTMENT BY WILL.

216. BENEVOLENT SOCIETY — ENDORSEMENT ON POLICY IN FAVOR OF INFANT BENEFICIARY -- SUBSEQUENT CHANGE OF DIRECTION BY WILL—APPOINTMENT OF TRUSTEE—NO TRUSTEE NAMED—PAYMENT TO EXECUTORS—GUARDIAN APPOINTED IN A FOREIGN STATE—SECURITY.

217. BENEVOLENT SOCIETY—CERTIFICATE PAYABLE TO "LEGAL HEIRS"—CHILDREN OF FIRST MARRIAGE ONLY ENTITLED TO CLAIM—EXCLUSION OF SECOND WIFE.

218. POLICY FOR THE BENEFIT OF CHILDREN -- TESTAMENTARY DIRECTIONS—POWERS OF EXECUTORS AND TESTAMENTARY GUARDIAN AS TO PROCEEDS.

219. POLICY FOR THE BENEFIT OF WIFE—ASSIGNMENT BY WIFE—SEPARATE ESTATE.

220. INSURANCE FOR THE BENEFIT OF WIVES AND CHILDREN—NO POWER TO DIVERT POLICY MONEY BY WILL—REVOCATION BY LAW CONTRARY TO THE SPIRIT OF THE ACT—SUBJECT TO TESTAMENTARY DIRECTIONS—RENUNCIATION BY EXECUTORS OF PROBATE—

REVOCATION OF GRANT TO MINOR SON—APPLICATION OF COMPANY TO PAY MONEY INTO COURT—EXCLUSION OF ADMINISTRATOR—INSURANCE MONEY NOT SUBJECT TO CONTROL OF CREDITORS—ORDER DIRECTING MONEY IN COURT TO BE PAID TO COMPANY—JOINT TENANCY—POWER OF NOMINATION.

221. TRANSFER BY WIFE NULL IN QUEBEC.

222. EXEMPTION OF POLICY FOR THE BENEFIT OF THE WIFE.

223. INTEREST OF WIFE IN HUSBAND'S POLICY CEASES IN CASE OF DIVORCE.

224. BEQUEST OF POLICY TO WIFE—EXECUTOR'S PLEA OF PLENE ADMINISTRAVIT—ASSETS QUANDO.

225. APPROPRIATION FOR WIFE.

226. POLICY FORMING AN ASSET OF THE COMMUNITY, WIDOW ENTITLED TO ONE-HALF.

227. DEATH OF INSURED THROUGH CRIME OF WIFE.

228. BENEFIT SOCIETY—CHANGE OF DIRECTION AS TO PAYMENT—TRUST—REVOCATION — ENDOWMENT CERTIFICATE — TESTAMENTARY DIRECTIONS—RIGHT OF SOCIETY TO LIMIT BENEFICIARIES TO CERTAIN CLASS—SUBSTITUTION OF OTHERS BY WILL—INTEREST AND RIGHTS OF INSURED AND OF BENEFICIARIES—ASSIGNMENT OF POLICY TO SECURE DEBT—EVIDENCE BY AFFIDAVIT OF LOSS OF POLICY.

229. ASSURANCES EFFECTED IN ONTARIO WITH QUEBEC COMPANIES—ASSURED UNMARRIED AT THE TIME—POLICIES AFTER MARRIAGE ENDORSED IN FAVOR OF WIFE—ADMINISTRATORS OF ESTATE ENTITLED TO INSURANCE MONEY.

230. TESTAMENTARY DIRECTIONS WITHIN THE MEANING OF THE ONTARIO ACT.

231. PAYMENT OF INSURANCE MONEYS INTO COURT.

232. NON-PAYMENT OF PREMIUM NOTE—BENEFITS INTER-VIVOS.

233. SOCIETIES INCORPORATED UNDER THE BENEVOLENT SOCIETIES ACT.

234. RECENT AMERICAN DECISIONS—BENEFICIAL INSURANCE CERTIFICATE IN FAVOR OF "FAMILY"—GRAND-CHILDREN NOT ENTITLED TO BENEFIT.

235. POLICY FOR THE BENEFIT OF A SISTER—ASSURED UNMARRIED AT THE TIME—CHANGE OF BENEFICIARY AFTER MARRIAGE—FIRST BENEFICIARY DECLINING TO SURRENDER POLICY FOR THE BENEFIT OF THE MOTHER—POLICY SURRENDERED AFTER MARRIAGE AND NEW POLICY EFFECTED ON BEHALF OF WIFE—NO POWER OF REVOCATION.

236. POLICY FOR THE BENEFIT OF WIFE—SURRENDER—NEW POLICY ON BEHALF OF BROTHER AS SECURITY FOR DEBT—PARAPHERNAL PROPERTY—PAROL DECLARATIONS IN PAID.

237. POLICIES FOR THE BENEFIT OF WIFE AND CHILDREN—PRECEDENCE OF WIFE—SURRENDER OF POLICIES BY ASSURED CLAIMING TO ACT AS GUARDIAN FOR HIS CHILDREN—SURRENDER OF LAPSED POLICY—RELIEF AGAINST FORFEITURE FOR BREACH CAUSED BY IGNORANCE—PARTICIPATION OF COMPANY BY FRAUD—COMPANY STOPPED TO DEFEND ON THE GROUND OF NON-PAYMENT OF PREMIUM.

238. SURRENDER OF POLICY ISSUED TO ONE AS TRUSTEE FOR HIS CHILDREN—SUBSTITUTION OF NEW POLICY IN THE NAME OF SECOND WIFE—FAILURE TO PAY PREMIUMS WAIVED BY COMPANY ISSUING NEW POLICY—DIVERSION OF TRUST FUND.

239. REVISED STATUTES OF QUEBEC, 1888, ARTICLE 1265 & SEQ.—MARRIAGE COVENANTS AND EFFECT OF MARRIAGE UPON PROPERTY OF CONSORTS—LIFE INSURANCE OF HUSBANDS AND PARENTS—58 VIC. C. 46—STATUTE RESPECTING LIFE INSURANCE AND COMMUNITY.

240. SECTIONS OF THE ONTARIO INSURANCE ACT, 1897, 60 VIC., C. 36. IN AS FAR AS THEY APPLY TO SUBJECT MATTER DEALT WITH IN THIS CHAPTER.

241. STATUTORY ENACTMENTS OF BRITISH COLUMBIA—CONSOLIDATED ACTS, 1888, C. 80—FAMILIES INSURANCE ACT, 1895, BRITISH COLUMBIA.

242. REVISED STATUTES OF NOVA SCOTIA, 1880, C. 94—MARRIED WOMEN'S PROPERTY ACT, 1884.

243. REVISED STATUTES OF MANITOBA, 1891, C. 88, AND 1892, C. 95.

244. NEW BRUNSWICK LEGISLATION, C. 25, 5TH MARCH, 1895. AN ACT TO SECURE TO WIVES AND CHILDREN THE BENEFIT OF LIFE INSURANCE.

245. STATUTORY ENACTMENTS PRINCE EDWARD ISLAND, 35 & 36 VIC., C. 30—AN ACT RELATING TO LIFE ASSURANCE.

213. General remarks on legislation for the protection of preferred beneficiaries.—The different provinces of the Dominion have each special legislative enactments providing for insurances in favor of wife and children and in some of them of the mother and husband also: called in the Ontario Insurance Act "preferred beneficiaries."¹

These provisions will be found at the end of this chapter following the jurisprudence.² In some of the provinces the policies so assigned may be dealt with by the assured and the assignee acting together, in others they have no power to do so.

¹ R. S. Q. 1888 art. 5580 & seq. Ont. Ins. Act 1897, 60 Vic. c. 36, s. 150, 160. R. S. N. S. 1880, c. 94. New Brunswick Stats. of 1895, c. 25. R. S. M. 1891 c. 88. Consolidated Acts of B. C. 1888 c. 80; 35 & 36 Vic. c. 30 (P. E. I.) ² See *infra* § 239 *et seq.*

Thus, in Quebec, it has been held that the appropriated policy cannot be dealt with even by both parties acting together. The words of the statute "shall be unassignable by *either* of such parties" have been interpreted as equivalent to "shall be unassignable by *both* of such parties."¹

While in Ontario it may be assigned if the parties are of age and consent.

In British Columbia the law is similar to that in Ontario.³

In Manitoba the appropriated policy was formerly unassignable by either of the parties.⁴ But the law has been changed and the parties are now allowed to assign—"save during minority."⁵

In New Brunswick the appropriated policy may be assigned when the parties are of full age.⁶

In Nova Scotia and Prince Edward Island the question of the right to assign the appropriated policy is not dealt with by statutory enactment.

It has been held in Ontario that the declaration of appropriation may be effectively made even after a seizure of the policy by a creditor of the insured.⁷

214. Predecease of wife—Second marriage.—Where a married man insured his life the policy being made payable "to his wife Sarah, her executors, administrators, or assigns," the wife died before her husband, who married again, and died leaving a widow and children without having assigned the policy or altered the direction as to payment in it :—It was held that the policy fell under the provisions of the Act to secure to wives and children the benefit of life insurance and was for the benefit of the wife absolutely, the words of limitation having no effect, that the provision for payment lapsed by the death of the wife and that the policy moneys belonged to the personal estate of the husband.⁸

214a. Predecease of wife—Exclusion of grandchildren.—By a policy of insurance the insurers agreed to pay the amount of the insurance, after the death of the insured, to his wife, or her legal

¹ R. S. Q. (1888) 5604. *Cusson v. Faucher* 3 R. J. Q., S. C. 265.

² Ont. Ins. Act 1897, 60 Vic. 36 s. 161, ss. 2.

³ Families' Ins. Act 1895 (B. C.) c. 26, s. 28. ⁴ R. S. M. 1891, c. 84, sec. 26.

⁵ 58 Vic., c. 26, s. 5. (Man.) 1895. ⁶ N. B. Acts of 1895, cap. 25, s. 25.

⁷ *Weakes v. Frawley* 23 O. R. 235.

⁸ In re Eaton 23 O. R. 593, but see *infra* §§ 226 and 239a. as to effect of law of community in Quebec.

representatives or, if she should not then be living to her children, or to their guardian if under age. The wife predeceased the insured. Two of her children died before her, one of them leaving a child :—

Held, that only the children who survived the wife were entitled to share in the insurance moneys payable under the policy.¹

214b. Predecease of wife—Second marriage—Property bequeathed to daughter.—P. effected an insurance on his life for the benefit of his wife. The wife died first, and by her will named P. her universal legatee. P. married again, the contract of marriage stipulating separation of property. There was never any assignment of the policy for the benefit of the second wife. P. predeceased his second wife, and by his will bequeathed all his property to his daughter by the first marriage. The amount of the policy being claimed both by the daughter and the second wife, the insurance company deposited the amount in court :—Held, that the daughter was entitled to the amount of the insurance.²

214c. Policy in favor of daughter—Beneficiary predeceased—Bequest—Assured re-married.—In 1868, M. effected a policy on his life for the benefit of his daughter, who intermarried with the plaintiff and predeceased her father, having bequeathed her interest in such policy to the plaintiff (her executor) in trust for her only child. M's. wife died, and in 1877 prior to the marriage of his daughter, he married the defendant. In 1884 M. died intestate, leaving the defendant, his widow and one child surviving, without making any other disposition of his life policy. In an action by plaintiff against defendant, the widow and administratrix of M. it was :—

Held (affirming 10 O. R. 283) that the insurance money formed part of the personal estate of M., and as such was payable to defendant.³

215. Appointment by will.—Before the coming into force of 53 Vic. c. 39 (O.), a testator insured his life in a benefit society,

¹ *Murray et al v. Macdonald*, 22 O. R. 557.

² *Ætna Life Insurance Co.*, depositor ; *Gaucher et al* petitioners, and *Gosselin*, petitioner, 2 R. J. Q., S. C., 392, and see R. S. Q. 5572 & 5573 enacting that predecease of wife causes policy to revert to insured.

³ *Wicksteed v. Munro* 13 A. R. 496, and see *Spiers & Atty.-Genl.* 9 L. R. 450, regarding assignment in contract of marriage not notified to company, and *Labelle v. Honey*, 33 L. C. J., 252 *infra* § 226.

payable to his wife, if she survived him, if not, to his children, and also subsequently insured his life in another similar society, payable to his wife and children.

After the coming into force of the above Act, he made his will, bequeathing his wife one-half of his life policies for her life and widowhood, and after her decease, to his children in equal proportions.

Held that R. S. O. (1887), c. 136, sec. 6, the "Act to secure to wives and children the benefit of life insurance," as amended by 51 Vic. c. 22, sec. 3 and 53 Vic. c. 39, sec. 6 applied; and that the wife was entitled to one-half of the sum payable under the policy first mentioned for life, and the other moiety, being untouched by the will went to her absolutely, while as to the other insurance she was entitled to one-half for life or widowhood by virtue of the will.¹

216. Benevolent society—Endorsement of policy in favor of infant beneficiary—Subsequent change of direction by will.

—A testator insured his life in a benevolent society, the policy being payable to his "widow or orphans or personal representatives," and afterwards endorsed on the policy a direction that the same should be paid to his infant daughter. Subsequently by his will he devised the proceeds of the policy with other moneys to his executors upon certain trusts.

Held that the will was inoperative so far as it assumed to deal with the policy which was by the endorsement clothed with a statutory trust under section 5 of R. S. O. c. 136 in favor of the daughter, and that as the devise to the executors was repugnant to the trust they were not competent trustees within the meaning of section 11 of the above mentioned Act.

The mother of the infant having been appointed guardian and having given security for the proper application of the policy moneys, was appointed trustee.²

216a. Infant beneficiaries—No trustee named—Payment to executors.—Moneys payable to infants under a policy of life insurance may, where no trustee or guardian is appointed, under secs. 11 and 12 of R. S. O. ch. 136, (now Ont. Ins. Act, 1897, 60 Vic. c. 36, s. 155, ss. 2) be paid to the executors of the last will of

¹ *Re Cameron, Mason v. Cameron* 21 O. R. 634.

² *Scott et al v. Scott* 20 O. R. 313.

the assured, as provided by sec 12, without security being given by them, and payment to them is a good discharge to the insurers.¹

216b. Infant beneficiary—Guardian appointed in a foreign state—Security.—An infant was entitled to share in certain insurance moneys accruing under a policy upon the life of her deceased father. The infant lived with her mother in a foreign state, and the mother had there been appointed by a Surrogate Court guardian of the infant, and had given security to the satisfaction of that court. The mother petitioned the High Court to be appointed trustee under Revised Statutes of Ontario, chap. 136, s. 12 (now Ont. Ins. Act 1897, 60 Vic. c. 36, s. 155, ss. 2) to receive the infant's share of the insurance moneys without security :—

Held, following *Re Thin*, 10 Ontario Practice Reports p. 490, that the security given by the petitioner in the foreign court would not attach to her appointment as trustee under the Act ; and the court declined to appoint her unless she furnished the necessary security in Canada.²

217. Benevolent Society—Certificate payable to "legal heirs"—Exclusion of second wife.—A widower, having two children, insured in a benevolent society and took out his certificate payable to "his legal heirs" and subsequently married a second time, and died without having altered the certificate, leaving his wife surviving with the two children of the first marriage :—

Held, that the two children took the whole fund payable under the certificate to the exclusion of the wife.³

218. Policy for the benefit of children — Testamentary directions.—A testatrix having insured her life and made the policies payable to her two daughters, by her will requested her executors, the defendants, to place the amount thereof in some thoroughly safe investment until her daughters' majority or marriage, when the amounts and their accumulated interest should be divided equally between her daughters, and appointed her husband, the plaintiff, their guardian.

In an action brought by the guardian to have the proceeds of the policies handed over to him by the executors :—

¹ *Dodds et al v. Ancient Order of United Workmen et al* 25 O. R. 570. Under the Ont. Ins. Act, 1897 security must be given by guardian ; see 60 Vic. c. 36, sec. 155, ss. 3.

² *Re Slosson*, 16 Ontario Practice Reports, 156.

³ *Mearns v. The Ancient Order of United Workmen et al* 22 O. R. 34.

Held, that the insurance moneys being made payable to the daughters they were by 53 Vict. ch. 39, sec. 4 (O.), severed from her estate at her death and her testamentary directions could not affect the fund beyond what was permitted by that statute and R. S. O. ch. 136 :—

Held, also, that during the minority of the daughters the trustees appointed by the will as provided for by section 11, R. S. O. ch. 136, might by section 13 invest in manner authorized by the will ; but while the insured could give directions as to the investment she was not to control the discretion of the lawful custodian of the fund and child, in case the income was needed for maintenance or education, or the *corpus* for advancement :—

Held, also, that the guardian was the custodian of the daughters with the incident of determining to a large extent what should be expended in their bringing up, and that the executors had charge of the preservation and utilization of the fund :—

Held, also, that section 12 of R. S. O. ch. 136 does not justify an insurance company in paying the amount of a policy to a testamentary guardian, the guardian there named being one who has given security and that the court should not transfer the moneys from the executors to the father as testamentary guardian, as his right to handle any part of the fund was subject to the trusts specified in the will, the execution of which was vested in the executors.¹

219. Assignment by wife—Separate estate.—The interest of a wife in a policy effected by her husband on his own life and which has been declared by him to be for her benefit under section 5 of c. 136 R. S. O. (now Ont. Ins. Act 1897, 60 Vic. c. 36, s. 159, 160.) to secure to wives and children the benefit of life insurance, is her separate estate and may, in her husband's life time be assigned by her. The assignee under such an assignment, will be entitled to claim thereunder subject to the exercise by the husband of the powers conferred on him by section 6 of the Act cited above and amendments.²

220. No power to divert policy money by will.—Under sec. 6 (1) of the Act to secure to wives and children the benefit of life insurance R. S. O. ch. 136, as amended by 51 Vict. ch. 22, sec. 3

¹ *Campbell et al v. Dunn et al* 22 O. R., 98.

² *Graham v. Canada Life Ass. Co. Proctor v. Graham*, 24 O. R. 607.

and 53 Vict. ch. 39, sec. 6, (now Ont. Ins. Act 1897, 60 Vic. c. 36, s. 159-160) the insured has no power to declare by his will that others than those for whose benefit he has effected the policy or declared it to be, shall be entitled to the insurance money, nor to apportion it among others than those for whose benefit he has effected the policy or declared it to be.¹

220a. Insurance for the benefit of wives and children.—Revocation.—In 1869, Rees insured his life under the provisions of 29 Vic. chap. 17 (Q.), and insurance was payable to his wife should she survive him, or, failing her, for the benefit of his children. In 1878 the Act 41-42 Victoria, chapter 13, was passed, which enables a person who has effected an insurance for the benefit of his wife, or of his wife and children, etc., to revoke the benefit to the person or persons named in the policy and to make a re-appointment, but section 1 excepts rights accrued before the coming into force of the Act, all which rights “shall remain in force and continue to apply.” By virtue of this Act, Rees, in 1880, executed a document which did not mention his wife in the first paragraph, but merely stated that he desired to revoke the benefit conferred by the insurance upon his children generally. In the second paragraph, however, he declared his option that the insurance should be payable to one son named therein (the appellant) *and not to his wife*. Rees having died in 1892, the wife and the son named in the revocation, each asserted a right to the insurance.

Held (reversing the judgment of Davidson, J., R. J. Q. 5 S. C. 200):—1. The document in question, although faulty in the wording of the first paragraph thereof, nevertheless in the second paragraph sufficiently expressed a revocation of the benefit to the wife.

2. Persons named as beneficiaries in policies issued while the Act 29 Victoria (2), chapter 17, was in force have no accrued or vested right within the meaning of 41-42 Victoria, chapter 13, and the revocation and reappropriation made in 1880 were valid.

3. In any event, under Art. 1029, C.C., the husband had power to revoke the stipulation for the benefit of the wife, so long as she had not signified her assent thereto. It may be questioned

¹ *Re Grant* 26 O. R. 120 and 485. As to law on this point now see *infra* § 240.

however, whether the court did more than hold that in this particular case there was no vested right.¹

220b. Certificate in favor of wife and children—By-law contrary to the spirit of the Act.—An application by the Provincial Provident Institution to pay into Court the sum of \$2,000 moneys arising from an insurance certificate on the life of one Clark, deceased, less \$90.26, the amount of a note given by the insured in order to secure and stay the enforcement of a judgment against him on a debt due to the institution by the insured, not, however, for assessments on the policy. The moneys arising from the certificate were designated in favour of the wife and children of the assured. A by-law of the institution, provided that "any debt, dues or demands contracted by a member, beneficiary or beneficiaries with the institution shall be a charge upon or warrant a suspension of his certificate."

Held, that the Provincial Provident Institution has no power to make a by-law which will do away with the effect of sec. 39 of 55 Vic., chap. 39; that without the section it is contrary to the spirit of the "Act to secure to wives and children the benefit of life assurance" (R.S.O., chap. 136) to authorize anything on the part of the assured which will subvert or interfere with the amount payable under the policy for the benefit of the wife and children.

Held, also, the institution must pay the whole amount secured by the policy into court, with costs of official guardian to him.²

220c. Policy for the benefit of wife and children—Subject to testamentary directions.—A testator insured his life for the benefit of his wife and children. The policy provided that the money should be payable as might be directed by will. The testator by will appointed executors, and gave his wife the income of his estate for life and after her death the *corpus* to his son. The executors renounced probate, and after revocation of a prior grant to the son who was then a minor, administration was granted to the defendant P. The policy provided that the money might be payable to the executors or administrators. The Act 47 Vict. c. 20 (Ont) provides that such policy moneys to which infants are entitled, shall be payable to a "trustee, executor or guardian." P. claimed the money as administrator whereupon the insurance

¹ Rees & Hughes, R.J.Q. 3, Q.B. 443.

² Clarke & Provincial Provident Institution, 15 Can. L. T. 239.

company under section 15 of the Act, and G. O. 197 and Rule 541a O. J. Act, applied to the Master-in-Ordinary in Chambers for leave to pay the money into court. The Master held (1) that voluntary applications to pay money may be made in Chambers; (2) That under rule 541a O. J. Act, he had jurisdiction by virtue of the administration proceedings before him, to make the order; (3) That by the renunciation of the executors there was no "trustee, executor or guardian competent to receive the share of the infant;" (4) That the Act excluded the administrator from any claim to the fund, and his receipt would not be within the protection of the statute; (5) That the administrator was not a trustee by the will, except as holding surplus; (6) That the money was no part of the estate subject to the control of creditors and when paid in, should be "ear marked" and not mixed with the other funds of the estate. On appeal by the administrator P., Proudfoot, J. made an order directing that the money in court be paid out to the insurance company.¹

220d. Policy in favor of wife and children—Joint tenancy.

—In 1877, A. insured his own life and the policy declared that the funds of the company should be liable to the payment of the sum insured to the wife and children of the assured, pursuant to the provisions of the Married Woman's Property Act, 1870. A. died in 1891 leaving a widow and children:

Held, that the widow and children took as joint tenants.²

220e. Power of nomination—Policy for benefit of widow and children.—A policy of insurance gave a power of nomination to the assured, and provided that in default the moneys should go to his widow and children. The will of the insured who never made any nomination, disposition or charge affecting the policy, contained a gift of residue but did not refer to the policy or to sums due or any assurances:—

Held, that the policy was valid and that the moneys were distributable under the provisions of the policy and not as residuary estate.³

221. Transfer by wife null in Quebec.—The amount of an insurance effected on the life of her husband, payable to the wife

¹ Merchants' Bank v. Monteith *ex parte* Standard Life Ass. Co. 10 P. R. 588.

² In re Davies Policy Trusts, Chitty, J. (1892) 1 Ch. 90.

³ In re Davies, Davies v. Davies, Worth, J., (1892) 3 Ch. 63.

at his death, being unassignable under the provisions of R.S.Q., 5604, a transfer of such insurance by the wife is null, and she is entitled to claim the amount thereof notwithstanding the transfer.¹

222. Exemption of policy for benefit of wife.—A policy of life insurance effected on the life of a man for the benefit of his wife, cannot be claimed by the creditors of the husband in case of insolvency.² Nor by the creditors of the wife.³

223. Interest of wife in husband's policy ceases in case of divorce.—Where an insurance is effected upon the life of the husband, the amount whereof is payable to his wife on a date named in the policy or on the previous death of the husband, and the parties are subsequently divorced, the wife ceases to have any claim to the amount of the policy, which reverts to the husband.⁴

224. Bequest of policy to wife.—A bequest of a policy of life insurance to the testator's wife is a valid declaration of trust within the meaning of R.S.O. ch. 136, sec. 5 (now Ont. Ins. Act 1897, 60 Vic. c. 36, s. 159. Judgment of the County Court of Prince Edward on this point affirmed, Osler, J. A., dissenting.

The practice in force before the Judicature Act, under which a plaintiff taking issue on and failing on an executor's plea of *plene administravit* could not have judgment of assets *quando*, no longer exists, and it is now proper to give a plaintiff judgment of assets *quando* if his debt be established and such a judgment be desired.

Judgment of the County Court of Prince Edward on this point reversed.⁵

225. Appropriation for wife.—In *Bell v. Ottawa Trust & Deposit Company*, Justice Rose decided that the local Master at Ottawa was right in finding upon the evidence that Margaret H. McRae survived her husband. Mr. and Mrs. McRae and their son, with others, were sailing in Lake Deschene in a boat, which upset and all three McRaes were drowned. He also affirmed the Master's finding, that, under Mr. McRae's will and codicil, the

¹ *Cusson v. Faucher*, R.J.Q. 3 S.C. 265, but see Ont. Ins. Act 1897, s. 161, ss. 2c.

² *Bressard & Marsoin & Vilbon*, 17 L. C. J. 270, S. C. 1873, 29 Vic. c. 17, s. 5.

³ *Ib.* 18 L. C. J. 249, Q. B. 1874. ⁴ *Hart v. Tudor*, R.J.Q. 2 S.C. 534.

⁵ *McKibbin v. Feegan*, 21 A.R. 87, *re Lynn*, *Lynn v. Toronto General Trust Co.* 20 O. R. 475 and *Beam v. Beam* 24 O. R. 189 approved.

proceeds of policy of insurance must be distributed for the benefit of the creditors, and not go to his infant child and held that the language of 59 Vic. (O.), chap. 45, sec. 3, and proviso to sub-sec. 2, is not clear, but the fair meaning is that a declaration may be made under the statute by will, and that declaration by will shall take effect in priority to any declaration made before the date of the will, but there is nothing to say that a will shall speak save from the death of a testator, or that a declaration by will is not revocable as decided in 21 A. R. 87. In this case the codicil forms part of the will, both speak from the same date, and there could be no effectual declaration by the will except it be by last will, and so the proviso which declares that "the assured shall not, by virtue of section 2, be authorized to divert moneys or benefits from all of said class to a person not of said class or to assured himself or to his estate," does not apply to a declaration by will.¹

226. Policy forming an asset of the community, widow entitled to one-half.—L. insured his life for \$3,000 in an insurance company. the policy being made payable "to his executors, administrators or assigns." L. died intestate without issue, leaving his widow to whom he had been married before the date of the policy and with whom he was in community, and also leaving several brothers and sisters, who claimed the whole of said policy. The widow claimed one-half of the said policy as an asset of the community.

Held, that the said policy formed an asset of the community and that as such, his widow was entitled to one-half the amount due under it.²

227. Death of insured through crime of wife.—The executors of a person who had effected an insurance on his life for the benefit of his wife can maintain an action on the policy notwithstanding that his death was caused by a felonious act of his wife. The trust created by the policy under s. 11 of the Married Women's Property Act 1882, having been defeated by reason of her crime, the insurance money becomes part of the assured, and as

¹ Decided at Toronto 26 Febr., 1897, and not yet reported.

² Q. B. *Labelle v. Honey*, 33 L. C. J. 252, and see a similar holding in *Labelle v. Barbeau*, Q. B. 20 R.L. 607, and see *infra* § 229a.

between his legal representatives and the insurers no question of public policy arises to afford a defence to the action.¹

228. Benefit society—Change of direction as to payment.—A person whose life was insured in a benefit society incorporated under R.S.O. (1877) c. 167, as amended by 41 Vic. c. 8, sec. 18 (O), now Ont. Ins. Act 1897, 60 Vic. c. 36, on the 28th January, 1888, his first wife being then dead, caused to be issued to him a certificate making the insurance money payable to his children. After this he married again, and on the 1st June, 1889, at his request, a change was made, and a new certificate issued, making the money payable to his second wife. He died on the 10 November, 1889.

Held, reversing the judgment of Street, J., that the effect of 51 Vic. c. 22 (O), was to make the certificate of 28th January, 1888, subject to the provisions of R.S.O. c. 136, and that the rules of the society, in so far as they were inconsistent with such provisions, were modified and controlled by them; and such certificate became a trust for the children, under sec. 5 of R.S.O. c. 136, and ceased, so long as the object of the trust remained, to be under the control of the deceased, except only in accordance with secs. 5 and 6. which did not authorize him to revoke the certificate and replace it by the subsequent one.²

228a. Benevolent society—Change of beneficiaries.—An endowment certificate issued in 1889 by a benevolent society to a member and payable on his death half to his father and to his mother, contained a provision that should there be any change in the name of the payee the secretary should be notified and an endorsement thereof made on the certificate. The member subsequently married when he informed his wife that he would have the certificate changed, as he intended it for her, giving her the certificate, which she deposited in a trunk used by both in common, he continuing to pay the premium :—

Held, that this was not sufficient to displace the terms of the contract as manifested on the face of the certificate; and, further, so far as the mother was concerned, she was amply protected, 53 Vict. c. 39, sec. 5 (now Ont. Ins. Act 1897, 60 Vic. c. 36, s. 159)

¹ Cleaver v. Mut. Reserve Fund Life Ass. C. A. (1892), 1 Q. B. 147.

² Mingeaud v. Packer *et al* 21 O. R. 267., 19 A. R. 290, but see Rees & Hughes, *supra* § 220a.

which applied to the certificate in question creating a trust in her favor.

That statute is retrospective as to current policies, issued before it came into force.¹

228b. Benefit certificate—Change of beneficiaries.—In October, 1886 an endowment certificate upon the life of a widower with one child was issued to him by a benefit society, the sum secured thereby being designated by a clause therein as payable to the child. In February 1888, the insured having married again endorsed on the certificate a writing revoking the original designation and directing the payment to his wife. In November 1890 his wife having died he endorsed on the certificate a direction that payment should be made to his executors, administrators and assigns. He died in March 1893, a widower, leaving two children, the one first mentioned, and one born in May 1888. By this will, dated in July 1888, he left all his estate to his children in equal shares :—

Held, that under the powers conferred by R.S.O. c. 186, even as amended by 51 Vic. c. 22, (now Ont. Ins. Act 1897, 60 Vic. c. 36, s. 159-160) the insured had only a limited authority to vary the terms of the certificate ; and he could not revoke the direction for payment to his daughter and make a direction for payment to his wife. By virtue of 52 Vic. c. 39, sec. 6 he might, when he made the endorsement of November, 1890, have transferred or limited the benefits of the certificate in any manner or proportion he saw fit between his children ; that he could not destroy the trust created by the certificate and declare a new trust which might by making the fund applicable to the payment of debts deprive his children of all benefit in it, and so render the Act nugatory.²

228c. Benevolent society—Testamentary directions—Right of society to limit beneficiaries to certain class—Substitution of others by will.—A policy upon the life of the plaintiff's deceased husband was issued in Ontario before his marriage by a benevolent society not incorporated or registered under any Act of the Province of Ontario, payable to his mother, who predeceased him, or his executors. By one of the by-laws of the society it was

¹ *Simons v. Simons* 24 O.R. 662.

² *Neillson v. Trusts Corporation of Ontario* 24 A. R. 517. *Mingeaud v. Packer* 21 O. R. 267. 19 A. R. 290 followed.

provided that where the insured married after the date of the policy, it *ipso facto* became payable to the widow, "unless otherwise ordered after date of such marriage." Under another by-law the policy could be made payable only to a wife, an affianced wife, a blood relation or a person dependent on the assured, and was not to be willed or transferred to any other person. By his will the deceased purported to give to his widow the amount of this and another insurance, subject, however, to the payment of his debts.

Held, that the policy was capable of being controlled by conditions not set out upon its face, because sec. 4 of 52 Vic. c. 32 (O) amending the Ontario Insurance Act, R.S.O., c. 167, applies only to the companies to which the latter Act applies; and as the insurance and the rights of the parties under it did not depend upon anything contained in the "Act to secure to wives and children the benefit of life insurance," R.S.O. c. 136, it was not necessary to consider whether it was brought within the scope of that Act by its amendment by 51 Vic. c. 22, sec. 2 (O) and, therefore, the binding terms of the contract were to be found upon its face and in the rules of the society, which formed part of the contract.

Held, also, that under the terms upon which the society agreed to pay this money, the insured had no power to bequeath any part of it to his executors or his creditors, and the society had the right to say that their contract was to pay the money only within a certain class; and therefore the money belonged to the widow free from the obligation to pay debts.¹

228d. Interest and rights of insured and of beneficiaries—Assignment of policy to secure debt—Evidence by affidavit of loss of policy.—Where an insurance was effected upon the life of a person for the benefit of her father, brother and sisters, the plaintiffs,—

Held, that the beneficial interest in the policy, as soon as it was issued, vested in the plaintiffs, and the contract of the insurers being to pay them the money payable under the policy, the insured could not, by any act of hers, deprive them of the interest so vested in them or of their right to call upon the insurers for payment; and an assignment made by her and her father to secure a debt had no effect upon such interests or right of the plaintiffs, except that of the father; and the assignee under

¹ Morgan v. Hunt *et al* 20 O.R. 568.

the circumstances and evidence became the mortgagor of such interest and right, and the recovery of a judgment by the assignee against the father for the amount of the debt did not prejudicially affect the security.

Further evidence of the loss of the policy by affidavit was received by the Divisional Court under Con. Rule 585.¹

229. Assurances effected in Ontario with Quebec companies.—The husband of the defendant, while a bachelor domiciled in Ontario had in the years 1871 and 1876 effected three policies of insurance on his life with companies whose head offices in Canada were at M., in the Province of Quebec where the insurance moneys were payable. After his marriage, while still domiciled in this province, he endorsed declarations on the policies in favor of defendant and handed them to her. After his death the insurance moneys were claimed by the defendant and by the plaintiffs as administrators of his estate, against which there were creditors :—

Held, that the endorsements on the policies were governed by the law of Ontario. *Lee v. Abdy*² followed.

Held, however, that, as defendant's husband was not a married man at the time he effected the policies, he could not (not being within the exception provided in 47 Vic. c. 20 s. 2) withdraw from the claims of his creditors the benefits of the policies effected before marriage by endorsements or declarations after marriage for the benefit of his wife, and the plaintiffs were entitled to the insurance moneys.³

230. Testamentary directions within the meaning of the Ontario Act.—Two policies on his life were devised by a testator to his executors to be invested by them as a provision for his wife and children :—

Held, that the testator had declared the insurance to be for the benefit of his wife and children within the meaning of Revised Statutes of Ontario, c. 136, (now Ont. Ins. Act 1897, 60 Vic. c. 36, s. 159) and therefore the proceeds were exempt from the claims of creditors.⁴

¹ *Dolen et al v. Metropolitan Life Ins. Co. et al* 26 O. R. 67,

² 17 Q. B. D. 309.

³ *Toronto General Trusts Co. v. Sewell* 17 O. R. 442.

⁴ *Lynn v. Toronto General Trusts Co.* 20, O. A. 475 followed. *Beam v. Beam*, 24 O. R. 189.

231. Payment of insurance moneys into court.—On an application for leave to pay insurance money into court, claimed by different parties :—

Held, that subsection 5 of section 53 of the Ontario Judicature Act extends the benefits of the Act for the relief of trustees to such cases and that the applicants were entitled to pay the money in.¹

Subsection 5 of section 53 of the Judicature Act referred to in *re Bajus* is in the following words :—

“ 5. In case of an assignment of a debt or other *chose in action* if the debtor, trustee or other person liable in respect of the debt or *chose in action*, shall have had notice that such assignment is disputed by the assignor, or any one claiming under him, or of any other opposing or conflicting claims to such a debt or *chose in action* he shall be entitled, if he think fit, to call upon the several persons making claims thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court under and in conformity with the provisions of law for the relief of trustees.”

232. Non-payment of premium note—Benefits inter vivos.—In a recent case the company plaintiff claimed from the defendant the amount of a note dated at Montreal, 16th May, 1896, by which the latter promised to pay plaintiff, four months from date, the sum of \$133.30. The defendant pleaded that the note was made by his wife to pay a premium of insurance in favor of defendant, and that he signed it only to authorise his wife.

The court held, that it appeared by the application made to defendant, that the policy of insurance was not made in favor of defendant, and that it was not payable at the death of his wife, but fifteen years from date. The contract, therefore, did not fall within the provisions of article 1265 of the Civil Code, which prohibits husband and wife separated as to property from conferring benefits *inter vivos* upon each other. The plea was therefore dismissed and the action was maintained for the sum of \$133.30.²

233. Societies incorporated under the Benevolent Societies

—The “Act to secure to wives and children the benefit of life insurance,” 47 Vic. c 20 (Ont) applies to insurance in societies incorporated under the Benevolent Societies Act, R. S. O.

¹ Chancery Divisional Court ; *re Bajus* 24 O. R. 397.

² North American Life Assurance Company v. Pinoteau ; Loranger, J., Montreal, 26th Dec., 1896, not yet reported.

(1877) c. 167. Re O'Heron, 11 P. R. 422 overruled. Judgment of Proudfoot, J., reversed, Burton, J. A., dissenting.¹

234. Recent American decisions — Beneficial insurance certificate in favor of "family"—Grandchildren not entitled to benefit.—The certificate in this case designated the "family" of the member as the beneficiary. When issued, the family consisted of the member, his wife and a daughter. The daughter died, and when the member died his wife survived him, and there were several grandchildren. This made it necessary for the court to construe the certificate and determine who was entitled to the benefit. This they did as follows :—"The constitution and by-laws of the association and the application and admission of the member constituted the contract which now controls the rights of the contending parties. The deceased man agreed to pay certain assessments, and the association agreed to pay a sum of money to his family, and it was bound to pay to no other person. The family so designated, aside from the member himself, was made up of his wife and daughter, and he could derive no benefit from the fund because it was not payable and could not be realized until his decease. He had no interest in the fund and possessed only a power to appoint the ultimate beneficiary; and the rights of the party or parties so appointed by him became vested as soon as they were specified, subject to be divested by a revocation of such appointment by the member in his lifetime by the designation of some other recipient upon the books of the association. No such change was made, and so the wife and daughter were the beneficiaries, because they constituted the family of the member when the contract was consummated. Their interest in the fund was unlimited, because the designation included them as a class or an entirety; and when the daughter died the member was still alive, and the mother was all that was left of the family for whose benefit the contract and designation was made, and she thus became alone entitled to the benefit of the appointment and the proceeds of the contract. We deem it plain that membership was sought and accepted by the deceased for the benefit of the persons who constituted his household or family at the time of his application, and for their relief in case of his death; and as the widow is the only surviving member of that family, she alone fills the meaning

¹ *Swift v. Provid. Provident Instn.*, 17 A. R. 66. See now 60 Vic. c. 36 (O.)

of the term 'family' as employed by the member in his appointment and designation, and is entitled to the whole fund in controversy. While it is true that the case is novel and must be decided upon principle rather than authority, yet we think that the conclusions reached are in harmony with the doctrine of the . . . cases so far as they have any application."¹

235. Policy for the benefit of a sister—Change of beneficiary after marriage.—One at the time unmarried had issued to him an insurance policy upon his life, naming a sister as the beneficiary, and making her the depository of the policy. One of the conditions of the policy was: "This policy is issued and accepted upon the express condition that the assured may, with the consent of the company, at any time assign it, or before assignment change the beneficiaries therein, or make any other change." Afterwards marrying, in consideration of the marriage he agreed to make his wife the beneficiary. When paying the premium he requested the agent of the company to make the change; but the sister declining to surrender the policy, the company, though informed of the change desired, failed to formally make it.

The Supreme Court of Georgia held, as a question of law, that the effect of the condition before recited was to reserve to the life insured the right to change the beneficiary, and that, there being no condition in this policy requiring the consent of the beneficiary named therein to change in any of its terms or of the party entitled to claim under it, and whether such change was to be effected by parol or in writing being a matter entirely between the life insured and the company, if the latter chose to dispense with any of the modes of effecting this purpose this concerned no third party; furthermore, the company could not capriciously refuse to make the change. Also that, the marriage having been consummated on the inducement of the promised change of the beneficiary under the policy, equity would consider that done which ought to be done, and would give relief accordingly.²

235a. Policy for the benefit of the mother—Policy surrendered after marriage and new policy effected on behalf of wife.—In a Massachusetts case the insured had taken out when unmarried and living with his mother a life policy in the form of an

¹ Brooklyn Masonic Relief Ass. v. Hanson (1889), 53 Hun. 149.

² Nally v. Nally (1885), 74 Ga. 669.

endowment policy, but made payable to his mother as the beneficiary. She and his sister had furnished the money for the first premium. He kept the policy in his possession, and it was well understood between them all that it was for the benefit of the mother. After two years he married and surrendered the first policy and took a second making his wife the beneficiary; this second policy contained the statement that it was a continuation of the first policy. Upon his death there arose a question of who was the rightful beneficiary of this insurance.

The Supreme Court held the mother entitled, saying:—"In this case the assured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums, but the omission to do this did not have the effect to give him an implied power of revocation. His mother might herself continue the payment of the premiums. Moreover, by the terms of the policy, after payment of two full annual premiums it would not lapse, and certain valuable rights would still exist under it. Under these circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority."¹

236. Policy for the benefit of wife—Surrender—New policy on behalf of brother as security for debt.—In another case a husband had insured his life for the benefit of his wife. The policy being under his control, he had afterwards surrendered it to the company and had another issued, naming a brother, in consideration of indebtedness to him, as the beneficiary. Upon his death the widow brought action on the original contract represented in the policy which had been surrendered, and the brother's representatives upon the policy issued upon its surrender.

As to the rights of the widow, the beneficiary in the surrendered policy, the Supreme Court of Louisiana said:—"As to her, the company's contract was complete in its incipiency, and never changed thereafter with her consent. In law this policy inured to her separate paraphernal benefit, although not separate in property from her husband, the insured, and its character of paraphernal property could not be changed to that of separate

¹ *Pingrey v. Nat. Life Ins. Co.* (1887), 144 Mass. 374.

property of the husband, or that of the community, without her consent lawfully obtained. As such it could not be placed as security for her husband's debts."¹

As between the assured and the insurer the policy is a contract for the benefit of the beneficiary, who takes by contract rather than by inheritance. The naming of the beneficiary, though not a bequest, partakes of its nature.²

The declarations of the insured, made subsequently to taking out a policy of life insurance, to the effect that he intends by the words "My wife Mary and children," beneficiaries named in the policy, that it was for the benefit of this particular wife and her children, it was held in this case, were properly excluded as evidence upon the general principle that one party to a contract cannot, by parol declarations *in pais*, change the contract; and, aside from that, it was settled in Missouri that a person whose life is thus insured cannot by such parol declarations affect the rights of a beneficiary in the policy.³

237. Policies for benefit of wife and children—Predecease of wife—Surrender of policies—Relief against forfeiture for breach caused by ignorance.—Life policies were applied for by a wife through her husband, who acted for her as her attorney. The insurance was upon his life. The consideration for the policies was paid by her, as appeared from the recitals in the policies. The insurance was for the benefit of herself, and, in case of her death, that of her children. She died, her husband and children surviving her. After her death the husband upon some terms surrendered these policies to the company.

After his death the children surviving learned of the policies having existed and of their surrender to the company. They gave notice of the death of the life insured to the company and, before the commencement of any action, offered to pay the premiums unpaid upon the policies, according to their terms, and to furnish the company with the proofs of the death of the life insured, but the company refused to accept the premiums, asserting that the policies were purchased by them and were no longer in force. It may be stated that, in his negotiation with the company for the surrender of the policies, the husband claimed to act as guardian

¹ Putnam v. New York Life Ins. Co. (1890), 42 La. Ann. 739.

² Phillips v. Carpenter (1890), 79 Iowa 600.

³ McDermott v. Centennial Mut. Life Ass. (1837), 24 Mo. App. 73.

for his children. He was in fact a guardian of one, but the others were of age. The children thereupon brought an action to set aside the surrender of these policies and to recover the amounts secured by them.

The Supreme Court of New York in General Term held, that the surrender made by the husband was void, because not made upon the written request of the wife, as provided in the statute in relation to such matters. The court said: "The policy of insurance to a married woman, made under the statute, which allows such insurance for her benefit, and that of her children in case of her death, cannot be surrendered or transferred so as to divest the interests of the wife or her children in any other manner than that pointed out by this statute."

They continued: "It is doubtless true that an individual may cause his own life to be insured for the benefit of a brother, sister, or any other person, and that upon the death of such person the insured may surrender or dispose of the policy, but such cases are not within the provision of the statute cited, and are clearly distinguishable. The husband had no interest in the policy which he had a right to surrender or dispose of, and of this the company was well aware at the time it accepted from him the surrender of the policies. If he was authorized to act for her as her agent in procuring the policies and in making the payments of the premiums thereon, such agency terminated with her death and no longer existed at the time these policies were surrendered."¹

It was claimed also in this case by the company that one of these policies had lapsed before its surrender, by reason of the non-payment of the premium falling due December 6, 1873. To this the court said: "This would doubtless be the case were it not for the fact that the company subsequently, and on the 8th day of May, 1874, treated the policy as in force by accepting its surrender and paying a sum of money therefor. The fact that the company then treated the policy as in force leads us to presume that the default in the payment of the premium had been excused or postponed by some arrangement between the parties. We are, therefore, unable to see any reason for distinguishing this policy from the others, or of applying a different rule in determining the liability of the insurer thereon."

¹ Whitehead v. New York Life Ins Co (1884) 33 Hun. 425.

The court then proceeds to discuss the question of the relief asked, and matters incident thereto, as follows: "After the surrender, no further annual payments of premiums were made. For this reason it is claimed that they relapsed. The question is thus presented as to whether or not the children of the deceased wife can be relieved against forfeiture for a breach of this condition of the policies. It appears that neither of the children had any knowledge of the existence of the policies until after the death of their father. The rule is, that a court of equity will interpose its power to relieve against forfeitures for a breach caused by unavoidable accident, fraud, surprise or ignorance. Whilst sickness or insanity is not sufficient to excuse a default, yet war existing between the States in which the company is located and assured resides, so as to prevent the transmission of the premium, is.¹ Fraud on the part of the company, surprise or ignorance, in many cases is a ground upon which a court of equity may relieve against forfeiture. The *gravamen* of the action in this case is fraud on the part of the insurer and the husband and father. If fraud in fact existed, and such fraud tended to prevent the payment of the premiums we are of the opinion that the court may properly grant the relief asked for. They further held that the facts as disclosed justified a finding that the company participated in the fraud. The case was afterwards before the New York Court of Appeals which reversed the general term as to the one policy the forfeiture of which that court held has been waived, *arguendo* they said: "The plaintiffs stand here repudiating that surrender by the father, of the policy and insisting that it is fraudulent and void, and at the same time seeking the benefit under it as a revival of their forfeited policy. They would set aside where it harms them, and maintain it where it helps them. In so doing they utterly pervert the true nature of the transaction.

That was an effort not to revive the policy but to kill it, more effectually than ever, and so understood on both sides. It indicates no waiver by the company of existing rights but an attempt to acquire an added right and a new and further defence against liability. The forfeiture had relieved them from liability, but the policy itself was outstanding and might expose them to the appearance of the claim and a consequent litigation, and they paid something to secure its possession as a voucher and its final cancellation. The act was not in the least inconsistent with a position

¹ See Chap. XVI. *infra* for "Effect of war."

held and maintained, that the policy was valueless and unenforceable as an obligation, any more than that one who has a good title to real estate can be said to admit that he has one because he bought in for his safety and security a possible hostile claim which he did not deem valid. There is no proof in the case that the payment made to the father was in fact, or was called or deemed, a surrender value of the policy, so as to involve an admission of its validity beyond a marginal note in the receipt which is purely formal and might have been explained if excluded evidence had been admitted. On the contrary, our attention is called to the very smallness of the amount paid in comparison with the premiums received as indicating that the surrender value was not given and that the company made a rapacious and unjust bargain; and as to what was said and understood at the time, the door was closed by the objections of the plaintiffs and a ruling in their favor excluding the offered proofs. We see no justification for that ruling.

Continuing they said the evidence was not admissible on the ground of agency, but when the plaintiffs rely on the act of the company as a waiver it is vitally important to know just what that act in truth was and how and why the form of receipt came to be used. In the light of the ruling, we are bound to assume that the insurer might and would have proved that at the time of the surrender the insured was expressly told that the policy had lapsed and was forfeited, that the company stood upon its rights but that, if the insured would give up possession of the policy, they would give him a certain moderate sum as an act of kindness to an old agent of the corporation, and in recognition of an imperfect moral equity incapable of enforcement, but having about it a sort of rude justice. The pressure of that inchoate equity, even where the assured or their agent had been in fault through the non-payment of premiums, the insured might well and justly recognize; and if it did and paid a gratuity for that reason, the act stood expressly upon a lapse of the policy, and cannot be tortured into an admission of its vitality. It is obvious also, that in any sense the insured can be said to have recognized the policy as a valid and subsisting obligation, it was a conditional and not an absolute recognition. It was conditioned upon the surrender and made solely for that purpose. It is not in the least doubtful that, but for the agreement

to surrender, no sort of admission would have been made of existing validity of the policy. Nobody tells us what conversation occurred at the time, but the transaction itself leads to the inevitable interference that the waiver, if it can be deemed such, was conditional upon the surrender and cancellation of the policy and the plaintiffs cannot avail themselves of the waiver which their agent secured and repudiate the terms and conditions upon which alone he secured it.¹

They agreed with the court below as to the estoppel of the company to defend on the ground of non-payment of the premiums on the other two policies. They said : " The situation as to the other two policies is different in the very important particular that neither of them were forfeited when the surrender took place, and the failure to pay annual premiums occurred thereafter. As to these omissions two things happened which by possibility may have prevented such payments by the assured, and for which the insurer was accountable. No notices were sent either to the insured or to the children, and the company by their wrongful possession and cancellation of the policies and by their agreement of surrender, did an act the tendency and purpose of which was to prevent future payment by the parties interested. If the company had refused to buy in the policies of the insured, except with the consent of the assured (beneficiaries ?) one of two things would certainly have taken place, either, in view of their father's embarrassment, the children would have consented to the surrender, taking as their own the surrender value which belonged to them, or they would have kept the policies in life by themselves paying the premiums. Such action by the company in the line of its clear duty would have left the insured without the least motive for concealment of the situation from the children, and in all human probability given them a knowledge of their rights. But the agreement of surrender practically bought the father's silence. The result shows it. He kept the secret during his life because he had in his pocket what belonged to his children and not to himself and left the information in a letter found after his death, showing the duplicity of his dealing in the transaction. His conduct operated as a fraud upon the assured (beneficiaries ?) and in that fraud the insurer participated, with a full knowledge of the probable consequence. The company cannot defend upon a default

¹ Whitehead v. New York Life Ins. Co. (1886) 102 N.Y., 143.

to which its own lawful act contributed and but for which a lapse might not have occurred. The company kept the secret on its part, and now cannot set up as a defence the non-payment of premiums which it did not intend or expect to receive and which it may justly be said to have occasioned by its own unauthorized act.¹

238. Surrender of policy issued to one as trustee for his children—Failure to pay premium waived by company issuing new policy—Diversion of trust funds.—In a strongly contested case before the New York Court of Appeals, the facts were, that the life insured applied for and had issued to him, as trustee for his children, a policy of insurance upon his life, that as trustee of his children he paid the premiums upon the same for a number of years, that he defaulted in payment of a premium finally, and then surrendered the old policy and had a new one issued in the name of another beneficiary, a second wife, with the same number as the original policy and with the same premium as originally named, and as of the same age as when the first one was issued; and in the same transaction, though no contract was written in the original policy for a surrender value, yet a surrender value of the original policy was evidently agreed upon and was a part of the consideration moving the company to make the terms it did in the substituted policy.

The court below had upheld the right of the insured to surrender the original policy and receive another naming a different beneficiary. As to his power to control the original policy, the Court of Appeal said:—"He could not deal with it in controversion of his children's rights, especially with one fully apprised of those rights and of his position and duty as trustee. That he kept the policy in his own possession is an immaterial circumstance, for that possession was consistent with the trust and in entire accordance with its terms. On the face of the contract, he dealt and acted as trustee for the children, and had no personal or individual interest in the policy, and no control over it except in his trust character and capacity."

As to the transaction on the part of the beneficiary named in the second policy, which recited an amount to be paid by her on delivery of the policy, the court said:—"She paid it simply by

¹ Whitehead v. N. Y. Life Ins. Co. *supra* §.

the cancellation of the old policy and the transfer of its surrender value to the company in reduction of the annual premium, and by the process took away that amount from the original beneficiaries and appropriated it to her own use. This was accomplished by the joint acts of the insured, the trustee for the children and the company liable for the insurance."

As to the argument that the policy had lapsed and that the payment of these premiums was a mere voluntary act on the part of the insured, and that when he refused to pay them he had a right to do so, and was guilty of no wrong, the court said :—" All that is quite true, except that, after notifying the beneficiaries of the trust which he had voluntarily constituted for their benefit, and acting upon it until it had become valuable to them, good faith required that he should not end the trust without notice to them and an opportunity to preserve it, if they should be so disposed, unless it be true that they had no interest or rights in the trust property whatever. But the difficulty with this argument is, that the old policy did not lapse at all. The failure to pay the premium of 1878, if there was such failure, was waived by the company in issuing the new policy that was in all respects the continuation of the old policy, altered only by the substitution of a new beneficiary. Substantially, that was determined in *Barre v. Brune*, 71 New York, 261. It is suggested that facts in that case were that the lapse of the cancelled policy was arranged beforehand by collusion with the insurance company, while here the lapse occurred as a fact without the pre-existing knowledge or assent of the insurer, and it is urged that the latter's good faith should end in a different ruling. But good faith cannot be asserted of one who aids in the diversion of a known trust fund from its lawful owners to the possession and benefit of another; and the fact of waiver is not changed by the motive, good or bad, of the insurer. The issue of the new policy in continuation of the old one, and in preservation of all the essential rights of the latter, distinguishes this case from *Whitehead v. New York Life Ins. Co.*, 102 N.Y., 143,¹ so far as the question of waiver is concerned, for there no new policy was issued at all, and the gratuity paid to obtain possession of the lapsed policy was consistent with a constant and continued assertion of its invalidity." There was an insistent that the trust was revocable at the option of the trustee and was so far executory as to be capable of revocation. Finch,

¹ *Supra* §.

J., says :—"But I think it is a mistake to assume that the trust was wholly executory. It had been to a large extent executed. Every payment of premium for fifteen years had steadily added to the value of the policy as the property of the beneficiaries. The day of final payment drew nearer and the burden of premiums decreased steadily in number. Each payment made added to the surrender value and fully executed the gift to the extent of that value. What the insured had done for the benefit of the assured (beneficiary?) he could not undo without their assent, nor take from them what was already theirs and destroy the trust so far as executed. The question here does not reach the enquiry what might be the rule in the case where the insured contracted in his own name, though for the ultimate benefit of others; for here he contracted explicitly as trustee, and, so far as the trust was executed, neither he alone nor he and the insurer together could wrest from the beneficiaries the product of the trust and direct it into other channels."¹

239. Revised Statutes of Quebec, 1888—Marriage covenants and effect of marriage upon the property of the consorts. (Article 1265 and seq).—

5580. Nothing contained in this section shall be held or construed to restrict or interfere with any right otherwise allowed by law to any person to effect or transfer a policy for the benefit of a wife or children, nor shall it apply to insurance made in favor of or transferred to any wife under her marriage contract.

5581. It is lawful for any husband :

(a) To insure his life ; or

(b) To appropriate any policy of insurance held by himself on his life : for the benefit of his wife ; or for the benefit of his wife and their children generally ; or for the benefit of his wife and his, her and their children generally ; or for the benefit of his wife and his or her children generally ; or for the benefit of his wife and one or more of his, her or their children ;

2. And for any father or any mother :

(a) To insure his or her life ; or

(b) To appropriate any policy of insurance held by himself on his life, or by herself on her life, for the benefit of his or of her children, or of one or more of them.

¹ *Garner v. Germania Life Ins. Co.* (1888), 110 N. Y., 266.

5582. The insurance mentioned in the preceding article may be effected either for the whole term of the life of the person whose life is insured, or for any definite period ; and the sum insured may be made payable upon the death of such person or upon his or her surviving a specified period not less than ten years.

5583. The premium for such insurance may be payable during the whole life of the person whose life is insured, or during any period, not less than ten years ; and the same may be paid by yearly, half yearly, quarterly or monthly payments.

5584. The appropriation of the policy mentioned in article 5581 is made by a declaration in writing endorsed upon, or referring and attached to the policy appropriated.

A duplicate of the declaration must be filed with the company which issued the policy, and a note of the filing of such duplicate must be endorsed by the company on the policy or on the declaration.

5585. Such insurance may be effected and such declaration of appropriation may be made by a married woman without the authorization of her husband.

5586. When the insurance is effected or the appropriation is made for the benefit of more than one person, the husband, father or mother whose life is insured may, in the application and policy, or in the declaration of appropriation, apportion the amount of the insurance money as he or she may deem proper.

5587. When no apportionment is made, the parties interested share in the insurance as follows :—

1. If the insurance is for the benefit of a wife and the children issue of her marriage with the person whose life is insured, one-half for her and the other half for their children, who sub-divide equally ;

2. If for the benefit of a wife and her children, one-half for the wife and the other half for her children (whether issue of the same or of different marriages), who sub-divide equally ;

4. If for the benefit of a wife and her husband's and her own children, one half for the wife and the other half for his children (whether issue of their or of other marriages), such children sub-dividing equally ;

5. If for the benefit of a wife and one or more children specified by name, one-half for the wife and the other half for such child, or for such children who sub-divide equally ;

6. If for the benefit of children only generally, equally between the children of the parent whose life was insured, (whether issue of the same or different marriages) ;

7. If for the benefit of several children specified by name, equally between them.

5588. When any child, specified by name or included generally predeceases the person whose life is insured, the descendants of such predeceased child take his or her share by representation.

5589. When the insurance is effected or the appropriation is made without apportionment in favour of several children, whether it be jointly with a wife or in favour of children alone, if any of such children predecease the person whose life is insured, without issue, accretion takes place in favour of the surviving children.

When the insurance effected or appropriation made without apportionment is in favour of a wife and a child or children ; if the wife predeceases her husband, accretion takes place in favour of the child or children ; and if the child or all the children predecease the husband, accretion takes place in favour of the wife.

5590. It shall be lawful for any party who has effected an insurance, or who has appropriated a policy of insurance, for the benefit of a wife or of a wife and child or children, or of a child or children, at any time and from time to time thereafter, to revoke the benefit conferred by such insurance or appropriation, either as to one or more or as to all of the persons intended to be benefited, and to declare in the revocation that the policy shall be for the benefit only of the persons not excluded by the revocation, or for the benefit of such persons not excluded, jointly with another or others, or entirely for the benefit of another or others not originally named or benefited.

Such other or others must be a person or persons for whose benefit an insurance may be effected or appropriated under these provisions.

5591. Such revocation may be made either by an instrument to be attached to the policy, and of which a duplicate must be filed with the company which issued the policy, and a note of the filing of such duplicate must be endorsed by the company on the policy, or on the instrument retained, or by will, of which, after the party's death, an authentic copy must be signified upon the company.

In default of such duplicate being filed or of such copy being

signified, the company will be validly discharged by paying the insurance money according to the terms and directions of the policy, or of the declaration or of a previous revocation.

5592. The policy reverts to the insured :

1. When the child for whose benefit it was effected or appropriated or the surviving child for whose benefit it was effected or appropriated or the surviving child for whose benefit solely it exists, dies without issue, before the person insured.

2. When the wife for whose sole benefit it exists either by the policy, appropriation or revocation, or by accretion, predeceases her husband with or without issue.

The benefit of any share in an apportionment likewise reverts to the insured when the child to whom it was apportioned, dies without issue before the insured parent, or when the wife to whom it was apportioned, predeceases her husband with or without issue.

5593. When a policy reverts to the insured, in whole or in part, the insured may deal therewith in so far as it so reverts as if the insurance had been effected and had always held for his own benefit.

5594. The insurance effected in the cases mentioned in the preceding articles may be made payable by the application and policy or by the declaration or apportionment or by a revocation, either to the parties benefited or to any other persons as trustees for the parties benefited.

5595. When no trustees are appointed by the application, policy, or by the declaration of appropriation or by revocation, it shall be lawful for any person whose life is insured, by an instrument to be attached to the policy, and of which a duplicate must be filed with the company which issued the policy and its filing be noted by the company upon the instrument retained or by will, of which (after the testator's death) an authentic copy must be signified upon the company, to appoint a person as trustee for the parties benefited or for any of them.

5596. When the person whose life is insured dies without having appointed trustees for any minor children benefited or for any benefited persons disqualified from exercising their rights, the payment of the insurance money coming to such minor children or disqualified persons shall be made to the testamentary executors of such insured person, who shall be the trustees of such disqualified persons.

In case trustees of persons in the exercise of their rights should refuse to accept, the payment shall be made to such benefited persons themselves.

5597. The payment made to any benefited persons not disqualified from exercising their rights, to any trustees, to any executors, or to any tutor or curator, shall be a valid and sufficient discharge to the insurance company for the insurance money so paid.

The company shall not be bound to see to the investment of the money, or be liable for the subsequent misapplication thereof by any trustees, executors, tutors, or curators.

5598. The trustees shall pay over the insurance money received for persons in the exercise of their rights to such persons at once, if no conditions have been imposed as to such payment, by the insured, by the policy itself, by the declaration of appropriation or by the terms contained in a deed of revocation.

If conditions have been imposed, the trustees shall carry out the trust and administer and pay over the insurance money in accordance with its provisions.

The insurance money received by any trustees, executors, tutors or curators for minors or persons disqualified from exercising their rights, shall be invested by the parties receiving it in Dominion, or Provincial debentures, municipal debentures or on first privilege or hypothec upon real estate, with power, however, to such trustees, testamentary executors, tutors or curators, from time to time, to alter, vary and transpose the investments held.

5599. All or any part of the annual income arising from the investment of the insurance money may be applied towards the maintenance and education of the minor children, or towards the maintenance of the persons disqualified, for any other reason than that of minority, from exercising their rights, as the trustees, testamentary executors, tutors or curators may think fit.

When all the annual income is so applied, the surplus shall be capitalized and invested in the same manner as the insurance money received.

5600. Unless stipulations or conditions have been imposed, which must be carried out, the investment shall be transferred by the trustees, testamentary executors, or tutors or curators :

1. In the case of a minor, to himself when he attains majority ;
2. In the case of a person disqualified for any other reason

than that of minority, from exercising his rights, to himself when he regains their exercise, or to his heirs when he dies without regaining their exercise.

It shall, nevertheless, be lawful, should the trustees, testamentary executors or tutors think fit, to advance the insurance money, or to dispose of the investments and advance the proceeds to any minor child during his minority for the establishment, advancement or preferment in the world, or for the settlement in marriage, of such child.

5601. If a person who has effected or appropriated an insurance for the benefit of a wife or of a wife and children, or of a child and children only, finds himself unable to continue to meet the premiums, it shall be lawful for him to surrender the policy to the company which granted the same, and to accept, in lieu thereof, a paid-up policy, payable at the time, in the manner and for the benefit of the persons mentioned in the original policy; and the share of each person, when more than one are benefited, will be proportionately reduced.

5602. Any person having effected an insurance with profits may either receive the same for his own benefit, or may, from time to time, either apply the same in payment or reduction of premiums, or direct them to be added to the insurance money; and the share of each person, when more than one are benefited, will, in the last case, be proportionately increased.

Profits accruing after a policy has been paid up, may be received by the insured for his own benefit, or may be added to the insurance money; and the share of each person, when more than one are benefited, will then also be proportionately increased.

5603. Any person who has effected or appropriated an insurance for the benefit of a wife, or of a wife and child or children, or of a child or children only, and who finds himself unable to continue to meet the premiums, may from time to time borrow, on the security of the policy, such sum as may be necessary to keep the policy in force.

The loans shall be evidenced by a writing of which a duplicate must be filed with the company which issued the policy and noted by the company on the duplicate retained by the lender.

Such loans shall be secured by privilege on the policy, and the company shall retain a sufficient amount to pay them from the insurance money.

If such loans be paid before the death of the insured, the acquittance shall be filed with the company.

5604. Policies effected or appropriated under this section are exempt from attachment for debts due either by the insured or by persons benefited, and shall also be unassignable by either of such parties.

The insurance money, while in the hands of the company, shall be free from and be unattachable for the debts either of the insured or of the persons benefited, and shall be paid according to the terms of such policies, or of any declaration of appropriation, or of any revocation relating to the same.

Such exemption shall not apply to any policy, or to part thereof, which may have reverted to and be held by the insured.

5605. The insurance money shall not be deemed to be derived from the succession of or community of property with, the person whose life was insured, and its receipt by any person benefited shall not constitute an acceptance of the succession of such person or of any community of property which existed with such person.

5606. If, however, it shall be proved that all or any of the premiums were paid, at a time when the person whose life was insured was insolvent, in fraud of the rights of creditors, such creditors shall be entitled to recover and to receive out of the insurance money, an amount equal to the premiums so paid; and in such case, the share of each person, when more than one are benefited will be proportionately reduced.

239a. 58 Vic. c. 46 Q.—An Act respecting life insurance and community.—

1. When a husband, who is in community of property with his wife, has insured or insures his life during the existence of the said community, for a premium payable at stated periods, and that such insurance has been made or is payable to his wife, or that it has been made or is payable to the husband or to his assigns, and that the wife has predeceased him, or predeceases him, and that he survives longer than the year covered by the last payment made during the existence of the community, then, if the husband, after the dissolution of the said community, has alone paid up or pays up the said premiums he remained and remains sole master and proprietor of any such insurance, the capital of which shall belong to his estate at his death, subject only to the obligation of accounting to the community for the surrender value of such insurance at

the time of the dissolution thereof, which value shall be stated in the inventory.

When, at the dissolution of the said community, the number of premiums paid are not sufficient to give a surrender value to the policy, if the husband afterwards pay the number of premiums required to give a surrender value to the policy, then the husband or his estate shall account to the community for only the proportion represented by the premiums paid during the community.

2. The preceding provisions shall, as to the past, only apply to such contracts of insurance or policies which are still in force, and where the husband is still living when this Act comes into force, whether the wife shall have predeceased him, or shall hereafter predecease him.

3. The rights acquired by creditors before the coming into force of this Act are preserved.

4. This Act shall not be interpreted as declaring that the law was previously different from that herein expressed.

5. This Act shall come into force on the day of its sanction.

240. Sections of the Ontario Insurance Act, 1897, 60 Vic., c. 36, in as far as they apply to subject matter dealt with in this chapter.—151.—(2) *Frauds in payments of premiums.* If the policy was effected and premiums paid by the assured with intent to defraud his creditors, the creditors shall be entitled to receive out of the sum secured an amount equal to the premiums so paid. R. S. O., 1887, c. 136, s. 22.

154.—(1) *Insurance money, how payable.*—When the insurance money becomes due and payable, it shall be paid within the time prescribed by section 80, and according to the terms of the policy or of any declaration or instrument as aforesaid, and shall, in the case of preferred beneficiaries, be free from the claims of any creditors of the assured except as in section 151 provided. R.S.O. 1887, c. 135, s. 10 (1).

(2) *Case of infant beneficiaries.*—Where the insurance money or part thereof is for the benefit, in whole or in part, of infants, and the infants are mentioned as a class and not by their individual names, the money shall not be payable to the infants until reasonable proof is furnished to the insurer of the number, names and ages of the infants entitled. R.S.O. 1887, c. 136, s. 10 (2).

155.—(1) *Appointment of trustees.*—The insured may, by the policy or by his will, or by any writing under his hand, appoint a

trustee or trustees of the money payable under the contract of insurance, and may from time to time revoke such appointment in like manner, and appoint a new trustee or new trustees and make provision for the appointment of a new trustee or of new trustees, and for the investment of the moneys payable under the contract. Payment made to such trustee or trustees shall discharge the company. R.S.O. 1887, c. 136, s. 11.

(2) *Where no trustee payment of shares of infants.*—If no trustee is named in the contract of insurance, or appointed as mentioned in sub-section 1, to receive the shares to which infants are entitled, their shares may be paid to the executors of the last will and testament of the assured, or to a guardian of the infants duly appointed by one of the Surrogate Courts of this Province or by the High Court, or to a trustee appointed by the last named Court, upon the application of the wife, or of the infants or their guardian, and such payment shall be a good discharge to the insurance company.

(3) *Security by guardian.*—A guardian appointed under sub-section 2 shall give security to the satisfaction of the Court or Judge for the faithful performance of his duty as guardian, and for the proper application of the money which he may receive.

Proviso.—Provided that where any insurance money not exceeding \$3,000 is payable to the wife and children of the assured, and some or all of the children are infants, the Court or Judge shall have discretion to appoint the widow of the assured, being the mother of such infants, as their guardian without security.

(4) *Surrogate fees in certain cases.*—Where probate is sought in respect of a will for the sole purpose of obtaining insurance money, the fees payable on an appointment of a guardian or representative shall be as follows :

Where the insurance money does not exceed \$1,000, \$4 ; where the insurance money exceeds \$1,000, but does not exceed \$2,000, \$6 ; where the insurance money exceeds \$2,000, but does not exceed \$3,000, \$8 ; and such fees shall be regulated (Rev. Stat. c. 58) in the manner prescribed by section 69 of *The Surrogate Courts Act*. Cf. R.S.O. 1887, c. 136, s. 14.

(5) *Investment of shares of infants.*—Subject to the express terms of the trust instrument (if any), any trustee named as provided for in subsections 1, 2 and 3, and any executor or guardian may invest the money received in any security in which trustees

under the law of the Province may invest trust funds, and may from time to time alter, vary and transpose the investments and apply all or part of the annual income arising from the share or presumptive share of each of the infants, in or towards his or her maintenance and education, in such manner as the trustee, executor or guardian thinks fit, and may also advance to and for any of the infants, notwithstanding his or her minority, the whole or any part of the share of the infant of and in the money, for the advancement or preferment in the world, or on the marriage, of such infant. R.S.O. 1887, c. 136, s. 13.

156.—(1) *Death of assured abroad, payment to foreign representative.*—Where under a contract made or by law deemed to be made in Ontario, the insurance money is payable to the representatives of a person who at his death was domiciled or resident in a foreign jurisdiction, and no person has become his personal representative in Ontario, the money may on the expiration of two months after such death, be paid to the personal representative appointed by the Court of the foreign jurisdiction provided it appears upon the probate or letters of administration, or other like document of such Court, or by a certificate of the Judge, under the seal of the Court, that it has been shewn to the satisfaction of the Court that the deceased at the time of his death was domiciled or resident at some place within the jurisdiction of such Court. R.S.O. 1887, c. 167, s. 137 (1) ; 51 V., c. 25, s. 1.

(2) *When contract directs payment to foreign representative.*—When the contract of such insurance provides that the insurance money may be paid to the personal representative appointed by the Court of the jurisdiction in which the deceased was resident or domiciled at the time of his death, the money may be paid to such representative accordingly at any time after the death aforesaid or according to the terms of the policy. 51 V. c. 25, s. 1.

(3) *Intestacy: payment (without representation) according to foreign law.*—Where under a contract made or by law deemed to be made, in Ontario the insurance money is payable to the representatives of a person who, at the time of his death was domiciled or resident in a foreign jurisdiction and died intestate, the money may after the expiration of three months after such death, if no person has become his personal representative in Ontario—be paid to the person or persons entitled according to the law of the foreign jurisdiction to receive the money and give a discharge for the same

if such money were by the terms of the contract payable in such foreign jurisdiction. 52 V. c. 32, s. 7.

(4) *Testacy : payment according to foreign law.*—When a testator domiciled or resident in a foreign jurisdiction disposes of the insurance money by a will, valid according to the law of that jurisdiction, then such money may be paid at any time after death, or according to the terms of the contract in that behalf, to the person or persons entitled under such will to receive and give a valid discharge for money payable in such foreign jurisdiction. 52 V. c. 33, s. 7.

(5) *Where guardian appointed by foreign Court.*—Where it appears upon any letters of guardianship or other like document, relating to persons under incapacity, issued or to be issued by a Court in a foreign jurisdiction, or by a certificate of the Judge under the seal of such Court, that it has been shown to the satisfaction of such Court that the assured at the maturity of the policy was domiciled or resident within its jurisdiction, and where security to the satisfaction of the Court has been given by the guardian or other like officer appointed by the said letters or document, then the High Court upon application for the appointment of the said guardian or like officer as trustee under this section, may dispense with the giving of security, provided it has also been shown that the infants or other beneficiaries under incapacity reside within the jurisdiction of the foreign Court, and that the proposed trustee is a fit and proper person, and that the security has, in accordance with the practice of such foreign Court, been given in respect of and for the due application and account of the money payable under the policy. 56 V. c. 32, s. 7 ; 59 V. c. 45, s. 4 (2).

(6) This section applies to policies heretofore issued as well as to policies to be issued hereafter, and whether the death has occurred before the passing of this Act or not. R.S.O. 1887, c. 167, s. 137 (2).

157.—(1) *Insurer may pay money into Court.*—If there is no trustee, executor, or guardian competent to receive the share of any infant in the insurance money, and the insurer admits the claim or any part thereof, the insurer at any time after the expiration of two months from the date of its admission of the claim or part thereof, may obtain an order from the High Court for the payment of the share of the infant into Court, and in such case the

costs of the application shall be paid out of the share (unless the Court otherwise directs), and the residue shall be paid into Court pursuant to the order, and such payment shall be a sufficient discharge to the insurer for the money paid ; and the money shall be dealt with as the Court may direct. R.S.O. 1887, c. 136, s. 15 (1).

(2) *Where claim admitted, but money not paid.*—If the insurer does not within sixty days from the time that the claim is admitted, either pay the same to some person competent to receive the money under this Act, or pay the same into the High Court, the said Court may upon application made by some one competent to receive the said money or by some other person on behalf of the infant, order the insurance money, or any part thereof, to be paid to any trustee, executor, or guardian competent to receive the same, or to be paid into Court to be dealt with as the Court may direct, and any such payment shall be a good discharge to the insurer. R.S.O. 1887, c. 136, s. 15 (2).

(3) *Costs.*—The Court may order the costs of the application, and any costs incidental to establishing the authority of the party applying for the order, to be paid out of such moneys, or by the insurer, or otherwise, as may seem just, and the Court may also order, the costs of, and incidental to, obtaining out of Court moneys voluntarily paid in by an insurer, to be paid out of such moneys. R.S.O. 1887, c. 36, s. 15 (3).

158.—(1) *Power to convert into paid up policy.*—If a person who has heretofore effected, or who hereafter effects, an insurance for the benefit of any preferred beneficiary or beneficiaries, whether such benefit appears by the terms of the policy or by endorsement thereon, or by an instrument referring to and identifying the policy, finds himself unable to continue to meet the premiums, he may surrender the policy to the insurer, and accept in lieu thereof a policy for such sum as the premiums paid would represent, payable at death or at the endowment age or otherwise as the case may be, in the same manner as the money insured by the original policy if not surrendered would have been payable ; and the company may accept the surrender and grant the paid up policy, notwithstanding any declaration or direction in favor of any preferred beneficiary or beneficiaries. R.S.O. 1887, c. 136, s. 16.

(2) *Power to borrow on the policy.*—The assured may, from time to time, borrow from the insurer, or from any other corporation, company or person, on the security of the policy, such sums as

may be necessary and shall be applied to keep the policy in force, and on such terms and conditions as may be agreed on; and the sums so borrowed together with such lawful interest thereon as may be agreed, shall, so long as the contract remains in force, be a first lien on the contract and on all moneys payable thereunder, notwithstanding any declaration or direction in favor of any preferred beneficiary or beneficiaries. R.S.O. 1887, c. 136, s. 17.

(3) *Power of assured and adults to deal with policy.*—Where all the beneficiaries, whether preferred or ordinary, are of full age, they and the assured may surrender the contract of insurance, or assign the same, either absolutely or by way of security. R.S.O. 1887, c. 136, s. 24 : 51 V. c. 22, s. 4 ; 53 V. c. 39, s. 8.

(4) *Who deemed person entitled to benefit of policy for purposes of subsection 3.*—Where by any contract of insurance or by the declaration endorsed upon or attached to or identifying by its number or otherwise, any contract of insurance (whether such declaration has heretofore been or shall hereafter be made), it is provided that the contract shall be for the benefit of a person, and in the event of the death of such person for the benefit of another person, such first mentioned person shall, if living, be deemed for the purposes of subsection 2 of this section, the person entitled to be benefited under such contract. R.S.O. 1887, c. 136, s. 25 ; 53 V. c. 39, s. 7 (1).

(5) This section shall apply not only to any future contract of insurance, and to any declaration made or relating to any such contract, but also to any contract of insurance heretofore issued and declaration heretofore made. 53 V. c. 39, s. 7 (2).

159.—(1) *Preferred beneficiaries.*—Where a person (hereinafter called the assured) effects insurance on his or her own life, and either by the contract of insurance, or by instrument in writing attached to or endorsed on, or identifying the said contract by number or otherwise, declares the insurance money or a portion of the principal or interest thereof to be for the benefit of the husband, wife, children, grandchildren or mother of the assured, then such contract shall (subject to the right of the assured to apportion or alter as hereinafter enacted) create a trust in favor of the said beneficiary or beneficiaries, according to the intent so expressed or declared, and so long as any object of the trust remains, the money payable under the contract shall not be subject to the control of the assured, or of his or her creditors, or form part of his or her estate,

when the sum secured by the contract becomes payable ; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration. R.S.O. 1887, c. 136, s. 5 ; 53 V. c. 39, s. 4, and s. 5 ; 56 V. c. 32, s. 8 (1) (2) ; 59 V. c. 45, s. 2.

(2) *Who shall constitute preferred beneficiaries.*—The husband, wife, children, grandchildren and mother of the assured shall constitute a class which may be known as “preferred beneficiaries,” and all other beneficiaries may be known as “ordinary beneficiaries.”

(3) In the case of a policy or written contract of life insurance effected before marriage, a declaration under this section shall be, and shall be deemed to be as valid and effectual as if such policy or contract had been effected after marriage. 53 V. c. 39, s. 2.

(4) *Insurance for benefit of future wife.*—When a contract of life insurance is effected by an unmarried man for the benefit of his future wife, or future wife and children, but the contract does not designate by name, or otherwise clearly ascertain a specific person as such intended wife, the contract not being within the intent of subsection 5 or 6 hereof, shall be construed as provided in subsection 7, 53 V. c. 39, s. 3 (1).

(5) *Where assured unmarried or widower without issue.*—When a contract is effected as in subsection 4, but at the maturity of the contract, the assured is still unmarried, or is a widower without issue, the insurance money shall fall into, and become part of the assured. 53 V. c. 39 s. 3 (2).

(6) *Where assured does not marry the specified beneficiary.*—When a contract of life insurance is effected by an unmarried man, for the benefit of his future wife, or future wife and children, and the intended wife is designated by name, or is otherwise clearly ascertained in the contract, but the intended marriage does not take place, all questions arising on such contract shall be determined as if this Act had not been passed. 53 V. c. 39, s 3 (2).

(7) *Where beneficiaries ascertained, but no apportionment made.*—Where two or more beneficiaries are designated or ascertained but no apportionment as among them is made all the said beneficiaries shall be held to share equally in the same, and where it is stated in the policy or declaration that the insurance is for the benefit of the wife and children generally, or of the children generally, without specifying the names of the children, the word “children” shall be held to mean all the children issue of the assured, living at the

maturity of the policy, whether by his then or any former wife, and the wife to benefit by the policy shall be the wife living at the maturity thereof. R.S.O. 1887, c. 136, s. 7 (1).

(8) *Where apportionment made, but beneficiary predeceases assured.*—If one or more of the preferred beneficiaries in whose favour the apportionment has been made, die in the lifetime of the insured, the assured may, by an instrument in writing, attached to or endorsed on or referring to and identifying the policy of insurance, by number or otherwise, declare that the share formerly apportioned to the person so dying shall be for the benefit of such other person or persons as he may name in that behalf, not being other than one or more of the class of preferred beneficiaries, and in default of any such declaration the share of the person so dying shall be for the benefit of the survivor or survivors of such preferred beneficiaries in equal shares. R.S.O. 1887, c. 136, s. 8 ; 59 V. c. 45, s. 4 (2).

(9) *Application of section.*—This section applies not only to any future contract of insurance, and to any declaration made on or relating to any such contract, but also to any contract of insurance heretofore issued and declaration heretofore made. R.S.O. 1887, a. 136, secs. 1, 2, 5 ; 53 V. c. 39, secs. 2, 4, 5 ; 56 V. c. 32, secs. 8 (1), (2) ; 59 V. c. 45, s. 1.

160.—(1) *Assured may vary benefit or beneficiary.*—The assured may, by an instrument in writing attached to or endorsed on, or identifying the policy by its number or otherwise, vary a policy or declaration or an apportionment previously made, so as to restrict or extend, transfer or limit, the benefits of the policy to the wife alone or to the children, or to one or more of them, or to the mother or any other preferred beneficiary of the assured, as a beneficiary or sole beneficiary, although the policy is expressed or declared to be for the benefit of the wife and children, or of the wife alone, or of the child or children, or any of them, or for the benefit of any one or more of the above mentioned persons for life and after his or their decease, for the benefit of any one or more of the survivors ; or, although a prior declaration was so restricted ; and he may also apportion the insurance money among the persons so intended to be benefited ; and may, from time to time, by instrument in writing attached to or endorsed on the policy, or referring to the same, alter the apportionment as he deems proper ; he may also, by his will make or alter the apportionment

of the insurance money ; and an apportionment made or altered by his will, shall prevail over any other apportionment by will ; and whatever the assured may, under this section, do by any instrument in writing attached to or indorsed on or identifying the policy or a particular policy or policies by number or otherwise. 59 V. c. 45, s. 2 (1).

(2) "*Apportion*," "*Apportionment*," *meaning of*.—"Apportion" or "apportionment" in this section includes and authorizes any division, sub-division, re-appointment, or disposition of insurance moneys or benefits among any of the class of persons who under this or any amending Act are persons included in the class of preferred beneficiaries ; and also includes and authorizes any disposition of the said moneys or benefits such as partly or wholly to divert the right or to enlarge or diminish the interest of a beneficiary or beneficiaries acquired under any prior disposition of the said moneys or benefits, or such as to substitute one beneficiary of the said class for any other or others, or all others, or conversely. 59 V. c. 45, s. 2 (2).

Proviso.—Provided that the assured shall not by virtue of the preceding sub-sections be authorized to divert the said moneys, or benefits from all of the said class to a person not of the said class, or to the assured himself, or to his estate ; or to divert the said insurance moneys or benefits, or any part thereof, from the original beneficiary when the policy expressly states that the beneficiary was a beneficiary for value. 59 V. c. 45, s. 2 (2).

(3) *Where beneficiary under friendly society contract is leading a criminal or immoral life*.—Where it is proved to the satisfaction of the executive of a registered friendly society that any beneficiary under an insurance certificate or contract of the society is leading a criminal or immoral life, then, and notwithstanding anything contained in this, or any other Act of the Province, it shall be competent for the assured, with the consent of the said executive, to declare either by endorsement on the certificate or contract or by other writing, that all right, title and interest of the said beneficiary in or to the benefit under the certificate is forfeited and annulled ; and thereupon the said right, title and interest shall be forfeited and annulled accordingly ; and the assured by a like writing may then or thereafter from time to time make a new appropriation in accordance with the lawful rules of the society, and may reappropriate the benefit ; and the right of the assured, in this

behalf shall be in addition to his rights under this or other Acts of the Province. 57 V. c. 48, s. 4 (1).

(4) *Case of other contracts.*—Where the contract is made by an insurer other than as mentioned in sub-section 3, then upon petition, and upon the like facts as in the said sub-section proved to the satisfaction of a Judge of the High Court the Judge may make an order annulling the benefits and granting such other relief as under the circumstances appears proper.

(5) *Application of section.*—This section applies not only to any future contract of insurance, and to any declaration made on or relating to any such contract, but also to any contract heretofore issued, and declaration heretofore made. 57 V. c. 48, s. 4 (2) ; 59 V. c. 45, s. 2 (3).

161.—(1) *Insured may direct application of bonuses and profits.*—The assured may, in writing require the insurer to pay the bonuses or profits, or portions thereof, accruing under the contract of insurance, to the assured, or to apply the same in reduction of the annual premiums payable by the assured, in such way as he may direct ; or to add the said bonuses or profits as the assured directs ; and according to the rates and rules established by the insurer ;

Proviso.—Provided always that the insurer shall not be obliged to pay or apply such bonuses or profits in any other manner than as lawfully stipulated in the contract or the application therefor. This section applies to contracts made before the 4th day of March, 1881, and to bonuses and profits then declared in respect of such policies, as well as to policies thereafter made and hereafter to be made. R.S.O. 1887, c. 136, s. 18.

(2) Any contract of insurance may be surrendered or assigned,

(a) Where the policy is for the benefit of children only, and the children surviving are all of the full age of twenty-one years, if the assured and all such surviving children agree to so surrender or assign ; or

(b) Where the policy is for the benefit of both a wife and children, and the surviving children are all of the full age of twenty-one years, if the assured, and his then wife (if any) and all such surviving children agree to so surrender or assign ; or

(c) Where the policy is for the benefit of a wife only, or of a wife and children, and there are no children living, if the assured and his then wife agree to so surrender or assign. R.S.O. 1887, c. 136, s. 7 (2).

241. Statutory Enactments of British Columbia—Consolidated Acts, 1888, 51 Vic., Chapter 80.—

36. It shall be lawful for any person to insure his life for the whole term thereof, or for any definite period, for the benefit of his wife or of his wife and children, or of his wife and some or one of his children, or of his children only, or some or one of them, and to apportion the amount of the insurance money, as he may deem proper, where the insurance is effected for the benefit of more than one.

37. The said insurance may be effected either in the name of the person whose life is insured, or in the name of his wife, or any other person (with the assent of such other person) as trustee; and the premium of any policy of insurance hereafter effected under this Act, shall be payable during the whole of the said person's life, or during any lesser period, by annual, half-yearly, quarterly or monthly payments.

38. It shall be lawful for any person, by writing endorsed upon or attached to any policy of insurance on his life, which may have been effected and issued before the passing of this Act, to declare that such policy and insurance shall be for the benefit of his wife, or of his wife and children, or of his wife or some one of his children, or of his children only, or some or one of them, and to apportion the amount of the insurance money as he may deem proper, when the insurance is declared to be for the benefit of more than one.

39. Nothing contained in this Act shall be held or construed to restrict or interfere with the right of any person to effect or assign a policy for the benefit of his wife or children as at present allowed by law, nor shall it affect any assignment of any existing policy made before the passing of this Act, nor any action or proceeding pending, at the time of the passing of this Act, in any court of law or equity.

40. *Payment of premiums.*—Any person insuring with profits may apply the same either in payment of premiums, or direct them to be added to the insurance money payable at death.

41. It shall be lawful for the person insured, from time to time, to borrow on the security of the policy such sum as may be necessary to keep the said policy in force; and the sum so borrowed shall be a first lien on the policy, notwithstanding any such direction in favour of the wife and children, or any or either of them.

42. If a person who has effected, or shall hereafter effect, an insurance in the terms of the said Act, shall find himself unable to continue to meet the premiums, it shall be lawful for him to surrender the policy to the company granting the same, and to accept in lieu thereof a paid up policy for such sum as the premiums paid would represent, payable at death, in the same manner as the original policy ; and the said company may accept, and surrender, and grant such paid up policy notwithstanding any such declaration or direction in favour of the wife and children, or any or either of them, of the insured.

43. *Distribution of moneys insured.*—Upon the death of the person whose life is insured, the insurance money due upon the policy shall be payable according to the terms of the policy or of the declaration as aforesaid, as the case may be, free from the claims of any creditor or creditors whomsoever.

44. When no apportionment is made in any policy or declaration as aforesaid, all parties interested in the said insurance shall be held to share equally in the same, and when it is stated in such policy or declaration that the insurance is for the benefit of the wife and children generally, without specifying their names, then the word “children” shall be held to mean all the children of the person whose life is insured, living at the time of his death, or whether by any other marriage or not.

45. In the event of some of the parties, for whose benefit the said insurance has been effected, dying in the life time of the insured, the moneys payable thereunder shall be payable to the survivor or survivors of such parties, or in case they shall also die, to the executors or administrators of the assured ; but nothing in this section contained shall be held to prevent the said assured from assigning the policy for the benefit of any future wife or children, or executing a declaration in their favour, or in favour of some one of them, as herein mentioned.

The above sections are repealed by 58 Vic, c. 26, s. 30, B.C., except as to *rights arising under them*.

241a. Families Insurance Act, 1895, B. C.—58 Vic., Chap. 26, 1895, entitled: “An Act to secure to wives and children the benefit of life insurance.”—

1. This Act may be cited as the “The Families Insurance Act, 1895.”

2. In this Act unless inconsistent with the context,—

(a.) “Contract of insurance.”

“Policy of insurance.”

“Policy.”

Shall include any certificate or contract hereinafter mentioned or in any way relating to life insurance.

(b.) “Maturity of the policy,” or “maturity of the contract” shall mean the happening of the event or the expiration of the term at which the benefit under the policy or contract accrues due.

3. The provisions of this Act shall apply to every lawful contract of insurance in writing now in force or hereafter effected, which is based on the expectation of human life, and shall include life insurance on the endowment plan as well as every other, and shall also extend to the said contracts of insurance where any declaration endorsed thereon or attached thereto, though made before the date of the passage of this Act, would have been or be within the operation and provisions of this Act, if the same had been made subsequent to the said date, and shall extend and apply to membership beneficiary and other certificates and contracts relating to life insurance issued or entered into by any society or association of persons for any fraternal, provident, benevolent, industrial or religious purposes, among the purposes of which is the insurance of the lives of the members thereof exclusively, or by any association for the purpose of life insurance formed in connection with any such society or organization, and from its members, including certificates or contracts heretofore issued or entered into.

4. It is hereby declared to have been lawful for any person on or after the 21st day of February, 1873, to endorse upon or attach to any policy of insurance on his life effected and issued before that day, whether the policy was issued before or after marriage, a written declaration that the insurance was for the benefit of his wife or of his wife and children, or of his wife and some or one of his children only, or of some one of them, and to apportion the amount of the insurance money as he deemed proper when the insurance was declared to be for the benefit of more than one.

5. Any person may insure his life for the whole term thereof, or for any definite period, for the benefit of his wife, or of his wife and children, or of his wife and some or one of his children, or of his children only, or of some or one of them, and, where the insurance is effected for the benefit of more than one, he may

apportion the amount of the insurance money, as he may deem proper.

6. The insurance may be effected either in the name of the person whose life is insured or in the name of his wife, or any other person (with the assent of such other person) as trustee.

7. In case a policy of insurance effected by a man on his life is expressed upon the face of it to be for the benefit of his wife, or his wife and children, or any of them, or in case he has heretofore endorsed, or may hereafter endorse, or by any writing identifying the policy by its number or otherwise, has made, or may hereafter make, a declaration that the policy is for the benefit of his wife, or of his wife and children, or any of them, such policy shall enure, and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the intent so expressed or declared, and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable ; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration. In the case of a policy of written contract of life insurance effected before marriage, a declaration under this section shall be, and shall be deemed to have been as valid and effectual as if such policy or contract had been effected after marriage, but nothing herein contained shall affect any action or proceeding now pending.

8. (1.) The insured may by an instrument in writing attached to or endorsed on, or identifying the policy by its number or otherwise, vary a policy or a declaration or an apportionment previously made so as to restrict or extend, transfer, or limit the benefits of the policy to the wife alone, or the children, or to one or more of them, as beneficiaries, or a beneficiary, or sole beneficiary, although the policy is expressed or declared to be for the benefit of the wife for life, and of the children after her death, or for the benefit of the wife, and in case of her death during the life of the insured, then for the child or children or any of them, or for the benefit of any one or more of the above mentioned persons for life, and after his or their decease for the benefit of any one or more of the survivors, or although a prior declaration was so restricted ; and he may also apportion the insurance money among the persons intended to be benefited, and may from time to time by an instru-

ment in writing attached to or endorsed on the policy, or referring to the same, alter the apportionment as he deems proper ; he may also, by his will, make or alter the apportionment of the insurance money ; and an apportionment made by his will shall prevail over any other made before the date of the will, except so far as such other apportionment has been acted on before notice of the apportionment by the will.

9. (1.) Where no apportionment is made, all persons entitled to be benefited by the insurance shall be held to share equally in the same ; and where it is stated in the policy or declaration that the insurance is for the benefit of the wife and children generally, or of the children generally, without specifying the names of the children, the word "children" shall be held to mean all the children of the insured living at the maturity of the policy, whether by his then or any former wife, and the wife to benefit by the policy shall be the wife living at the maturity thereof.

(2.) Any such policy may be surrendered or assigned,—

(a.) When the policy is for the benefit of the children only, and the children surviving are all of the full age of twenty-one years, if the person insured and all such surviving children agree to so surrender or assign ; or

(b.) Where the policy is for the benefit of both a wife and children, and the surviving children are all of the full age of twenty-one years, if the person insured, and his then wife (if any) and all such surviving children agree to so surrender or assign ; or

(c.) Where the policy is for the benefit of a wife only, or of a wife and children, and there are no children living, if the person insured and his then wife agree to so surrender or assign.

10. Where an apportionment as in sections 4, 5 and 8 provided for, has been made, if one or more of the persons in whose favour the apportionment has been made die in the lifetime of the insured, the insured may by an instrument in writing, attached to or endorsed on or otherwise referring to and identifying the policy of insurance, declare that the share formerly apportioned to the person so dying shall be for the benefit of such other person or persons as he may name in that behalf, not being other than the wife and children of the insured or one or more of them ; and in default of any such declaration the share of the person so dying shall be the property of the insured and may be dealt with and disposed of by him as he may see fit, and shall at his death form part of his estate.

11. Where no apportionment, as in sections 4, 5 and 8 provided for, has been made, if one or more of the persons entitled to the benefit of insurance die in the lifetime of the insured, and no apportionment is subsequently made by the insured, the insurance shall be for the benefit of the survivor, or the survivors of such persons in equal shares if more than one ; and if all the persons so entitled die in the lifetime of the insured, the policy and the insurance money shall form part of the estate of the insured ; or after the death of all the persons entitled to such benefit, the insured may by an instrument executed as aforesaid make a declaration that the policy shall be for the benefit of his then or any future wife or children, or some or one of them.

12. (1). When a contract of life insurance is effected by an unmarried man or a widower for the benefit of his future wife, or future wife and children, but the contract does not designate by names or otherwise clearly ascertain a specific person as such intended wife, the contract (not being within the intent of subsections (2) and (3) of this section) shall be construed according to the provisions of section 9 of this Act.

(2). When a contract of life insurance is effected as in subsection 1 of this section, but at the maturity of the contract the insured is still unmarried, or is a widower without issue, the insurance money shall fall into and become part of the estate of the insured.

(3). When a contract of life insurance is effected by an unmarried man or widower for the benefit of his future wife, or future wife and children, and the intended wife is designated by name, or is otherwise clearly ascertained in the contract of life insurance, but the intended marriage does not take place, all questions arising on such contract shall be determined as if this Act had not been passed.

13. (1.) A policy or written contract of life insurance effected by any woman on her own life, or on the life of her husband, and expressed to be for the benefit of her husband and children, or of either husband or children or any of them, shall be deemed a trust in favour of the objects therein named, and the moneys payable under such policy shall not, so long as any object of trust remains unperformed, form part of the estate of the deceased, or be subject to her debts.

(2.) Whatever under this Act a man may lawfully do, in

respect of insurance effected upon his life, may also, under the like circumstances, be done by a woman in respect of insurance effected upon her life, or effected by her on the life of her husband, and the like rules of construction shall prevail.

14. (1.) When insurance money becomes due and payable it shall be paid according to the terms of the policy or of any declaration or instrument as aforesaid, as the case may be, free from the claims of any creditors of the insured, except as herein provided.

(2.) Where the insurance money or part thereof is for the benefit, in whole or in part, of the children of the insured, and the children are mentioned as a class and not by their individual names, the money shall not be payable to the children until reasonable proof is furnished to the company of the number, names, and age of the children entitled.

15. The insured may, by the policy or by his will or by any writing under his hand, appoint a trustee or trustees of the money payable under the policy, and may from time to time revoke such appointment in like manner, and appoint a new trustee or new trustees, and make provision for the appointment of a new trustee or new trustees, and for the investment of the moneys payable under the policy. Payment made to such trustee or trustees shall discharge the company.

16. (1.) If no trustee is named in the policy, or appointed as mentioned in section 15, to receive the shares to which infants are entitled, their shares may be paid to the executors of the last will and testament of the insured, or to a guardian of the infants duly appointed by the Supreme Court of this province, or by any court having jurisdiction in that behalf, or to a trustee appointed by the court upon the application of the wife, or of the infants or their guardian; and such payment shall be a good discharge to the insurance company.

(2.) Where it appears upon the letters of the guardianship or other like document issued or to be issued, by a court beyond the jurisdiction of the province, or by a certificate of the judge under the seal of such court, that it has been shown to the satisfaction of such court that the deceased at his death was domiciled or resident within its jurisdiction, and where security to the satisfaction of the court has been given by the guardian or other like officer appointed by the said letters or documents, then the Supreme Court, upon application for the appointment of the said guardian or like officer

as trustee under this section, may dispense with the giving of security, provided it has been also shown that the infants reside within the jurisdiction of the foreign court, and that the proposed trustee is a fit and proper person, and that the security has, in accordance with the practice of such foreign court, been given in respect of and for the due application and account of the money payable under the policy.

17. Any trustee named, as provided for in the last preceding two sections, and any executor or guardian, may invest the money received in government securities or municipal debentures, or in mortgages of real estate, or in any other manner authorized by the will of the insured, or by the law in force for the time being relating to the investment of trust funds, and may from time to time alter, vary and transpose the investments, and apply all or part of the annual income arising from the share or presumptive share of each of the children, in or towards his or her maintenance and education, in such manner as the trustee, executor, or guardian thinks fit, and may also advance to and for any of the children, notwithstanding his or her minority, the whole or any part of the share of the child of or in the money, for the advancement or preferment in the world, or on the marriage of such child.

18. A guardian appointed under section 16 shall give security to the satisfaction of the court or judge for the faithful performance of his duty as guardian, and for the proper application of the money which he may receive.

19. (1.) If there is no trustee, executor, or guardian competent to receive the share of any infant in the insurance money, and the insurance company admit the claim, or any part thereof, the company at any time after the expiration of two months from the date of their admission of the claim or part thereof, may obtain an order from the Supreme Court for the payment of the share of the infant into court; and in such case the costs of the application shall be paid out of the share (unless the court otherwise directs), and the residue shall be paid into court pursuant to the order; and such payment shall be a sufficient discharge to the company for the money paid; and the money shall be dealt with as the court may direct.

(2.) If the company does not within four months from the time the claim is admitted, either pay the same to some person competent to receive the money under this Act, or pay the

same into the Supreme Court, the said court may upon application made by some one competent to receive the said money, or by some other person, on behalf of the infant, order the insurance money, or any part thereof, to be paid to any trustee, executor, or guardian competent to receive the same, or to be paid into court, to be dealt with as the court may direct, and any such payment shall be a good discharge to the company.

(3.) The court may order the costs of the application, and any costs incidental to establishing the authority of the party applying for the order, to be paid out of such moneys, or by the company, or otherwise, as may seem just, and the court may also order the costs of, and incidental to, obtaining out of court moneys voluntarily paid in by a company, to be paid out of such moneys.

20. If a person who has heretofore effected, or who hereafter effects, an insurance for the purposes contemplated by this Act, whether the purpose appears by the terms of the policy or by endorsement thereon, or by an instrument referring to, and identifying the policy, finds himself unable to continue to meet the premiums he may surrender the policy to the company, and accept in lieu thereof a paid-up policy for the benefit of the object or objects of the surrendered policy, and subject to be dealt with in like manner as the surrendered policy for such sum as the premiums paid would represent, payable at death or the endowment age, (or otherwise as the case may be) in the same manner as the money insured by that original policy, if not surrendered, would have been payable, and the company may accept the surrender and grant the paid-up policy notwithstanding any declaration or direction in favour of the wife, husband or children, or any or either of them.

21. The person insured may from time to time borrow from the company insuring, or from any other company or person, on the security of the policy, such sums as may be necessary and shall be applied to keep the policy in force, and on such terms and conditions as may be agreed on ; and the sums so borrowed, together with such lawful interest thereon as may be agreed, shall so long as the policy remains in force, be a first lien on the policy, and on all moneys payable thereunder, notwithstanding any declaration or direction in favour of the wife, husband, or children, or any or either of them.

22. Any person insured under the provisions of this Act may,

in writing, require the insurance company to pay the bonuses or profits accruing under the policy, or portions of the same, to the insured, or to apply the same in reduction of the annual premiums payable by the insured, in such way, as he may direct, or to add the said bonuses or profits to the policy ; and the company shall pay or apply such bonuses or profits as the insured directs, and according to the rates and rules established by the company ; Provided, always, that the company shall not be obliged to pay or apply such bonuses or profits in any other manner than as stipulated on the policy or the application therefor.

23. In the case of several actions being brought for insurance money, the court is to consolidate or otherwise deal therewith so that there shall be but one action for and in respect of the shares of all the persons entitled under the policy. If an action is brought for the share of one or more infants entitled, all the other infants entitled, or the trustees, executors, or guardians entitled to receive payment of the shares of such other infants, shall be made parties to the action, and the rights of all the infants shall be dealt with and determined in one action. The persons entitled to receive the shares of the infants, may join with any adult persons claiming shares in the policy. In all actions where several persons are interested in the money, the court or judge shall apportion among the parties entitled any sum directed to be paid, and shall give all necessary directions and relief.

24. The provisions of sections 16, 17, 18, 19, and 23 of this Act shall extend, and are hereby declared to have been intended to extend, and apply to cases where the insured died before the passing of this Act, as well as to cases arising subsequent thereto.

25. No declaration or apportionment affecting the insurance money, or any portion thereof, nor any appointment or revocation of a trustee made after the passing of this Act, shall be of any force or effect as respects the company until the instrument, or a duplicate or copy thereof, is deposited with the company. Where a declaration or endorsation has been heretofore made, and notice has not been given, the company may, until they receive notice thereof, deal with the insured or his executors, administrators, or assigns, in respect of the policy, in the same manner and with the like effect as if the declaration or endorsation had not been made.

26. If the policy was effected and premiums paid by the insured with intent to defraud his creditors, the creditors shall be

entitled to receive out of the sum secured an amount equal to the premiums so paid, without interest.

27. Nothing contained in this Act shall be held or construed to restrict or interfere with the right of any person to effect or assign a policy for the benefit of the wife, husband, or children, or some or one of them, in any other mode allowed by law.

28. Where all the persons entitled to be benefited, whether by original insurance, by written declaration, or by instrument of variation or apportionment, under any policy are of full age, they and the person insured may surrender the policy, or assign the same, either absolutely or by way of security.

29. Where any policy of insurance, or the declaration endorsed upon, or attached to, or identifying by its number or otherwise, any policy of insurance to which this Act applies, whether such declaration has heretofore been or shall hereafter be made, provides that the policy shall be for the benefit of a person, and in the event of the death of such person for the benefit of another person, such first mentioned person shall if living, be deemed for the purposes of section 28 of this Act, the person entitled to be benefited under such policy.

30. Sections 36, 37, 38, 39, 40, 41, 42, 43, 44, and 45 of the "Married Women's Property Act," are hereby repealed, but such repeal shall not affect any rights arising under such repealed sections, or any of them.

242. Revised Statutes of Nova Scotia, 1884, Chap. 94.—

1. This chapter may be cited as the "Married Women's Property Act, 1884."

11. A married woman, in her own name or that of a trustee for her, may insure for her sole benefit or for the use or benefit of her children, or of herself and her children, her own life, or, with his consent, the life of her husband, for any definite period, or for the term of her or his natural life; and the amount payable under such insurance shall be receivable for the sole and separate use of such married woman or her children, or herself and her children, as the case may be, free from the claims of the representatives of her husband, or of any of his creditors.

12. A policy of insurance effected by any married man on his own life and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate

use, or for his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of her husband, or to his creditors, or form part of his estate.

When the sum secured by the policy, becomes payable, or at any time previously, a trustee thereof may be appointed by a judge, and the receipt of such trustee shall be a good discharge to the insurance office, if it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

243. Revised Statutes of Manitoba, 1891, 55 Vic., Chap. 88—An Act respecting life assurance for the benefit of wives and children.—

1. This Act may be cited as "The Life Assurance Act."

2. It shall be lawful for any husband to insure his life for the benefit of his wife, or for the benefit of his wife and their children generally, or for the benefit of his wife and his, her and their children generally, or for the benefit of his wife and his or her children generally, or for the benefit of his wife and one or more of his or of her or of their children; and for any father or any mother to insure his or her life for the benefit of his or her children, or of one or more of them.

3. Such insurance may be effected either for the whole term of the life of the person whose life is insured or for any definite period; and the sum insured may be made payable upon the death of such person, or upon his or her surviving a specified period not less than ten years.

4. The premium for such insurance may be payable during the whole life of the person whose life is insured, or during any period not less than ten years, and the same may be paid by yearly, half-yearly, quarterly or monthly payments.

5. In case a policy of insurance effected by a married man on his life is expressed upon the face of it, to be for the benefit of his wife, or of his wife and children, or any of them, or in case he has heretofore endorsed or may hereafter endorse, or by any writing identifying the policy by its number or otherwise, or by will has made or may hereafter make a declaration that the policy is for the benefit of his wife or of his wife and children or any of them, such policy shall enure and be deemed a trust for the benefit of

his wife for her separate use, and of his children or any of them, according to the intent so expressed or declared, and so long as any object of the trust remains the money payable under the policy shall not be subject to the control of the husband or his creditors or form part of his estate, when the sum secured by the policy becomes payable: but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration.

(2). The insured may by an instrument in writing attached to or endorsed on or identifying the policy by its number or otherwise vary a policy or a declaration, or an appropriation previously made, so as to restrict or extend, transfer or limit the benefits of the policy to the wife alone or the children, or to one or more of them, although the policy is expressed or declared to be for the benefit of the wife and children or of the wife alone, or for the child or children alone, or for the benefit of the wife for life, and of the children after her death, or for the benefit of the wife, and in case of her death during the life of the insured, then for the child or children or any of them or although a prior declaration was so restricted; and he may also appropriate the insurance money among the persons intended to be benefited, and may from time to time by an instrument in writing attached to or endorsed on the policy or referring to the same alter the appropriation as he deems proper; he may also by his will make or alter the appropriation of the insurance money; and an appropriation made by his will shall prevail over any other made before the date of the will, except so far as such other appropriation has been acted on before notice of the appropriation by the will.

(3). Where an appropriation as in this section provided for has been made, if one or more of the persons in whose favour the appropriation has been made die in the lifetime of the insured, the insured may, by an instrument in writing attached to or endorsed on, or otherwise referring to and identifying the policy of insurance, declare that the share formerly appropriated to the person so dying shall be for the benefit of such other person or persons as he may name in that behalf not being other than the wife and children of the insured or one or more of them; and in default of any such declaration the share of the person so dying shall be the property of the insured, and may be dealt with and disposed of by him as he may see fit, and shall at his death form part of his estate.

(4). The provisions of sections 10 and 11 of this Act shall only apply when there is no appropriation under sub-section 3 of this section. (As substituted by 58 Vic. c. 26, s. 3 (Man.), 1895).

6. *Such appropriation shall be made by a declaration in writing endorsed upon, or referring and attached to, the policy appropriated ; a duplicate of the declaration must be filed with the company which issued the policy ; and a note of the filing of such duplicate must be endorsed by the company on the policy or on the declaration.* (Repealed by 58 Vic. c. 26, s. 3 (Man.), 1895).

7. Such insurance may be effected and such declaration of appropriation may be made by a married woman without the authorization of her husband.

8. When the insurance is effected or the appropriation is made for the benefit of more than one person, the husband, father or mother whose life is insured may, in the application and policy, or in the declaration or appropriation, apportion the amount of the insurance money as he or she may deem proper.

9. Where no apportionment is made the parties interested shall have the insurance money as follows : If for the benefit of a wife and the children, issue of her marriage with the person whose life is insured, one-third for her and the other two-thirds for their children, who will sub-divide equally ; if for the benefit of a wife and her children, one-third for the wife and the other two-thirds for the children, whether issue of the same or of different marriages, who will sub-divide equally ; if for the benefit of a wife and her husband's children, one-third for the wife and the other two-thirds for the children of her husband, whether issue of the same or of different marriages, who will sub-divide equally ; if for the benefit of a wife and her husband's and her own children, one-third for the wife and the other two-thirds for his children and for her children, whether issue of their or of other marriages, such children sub-dividing equally ; if for the benefit of a wife and one or more children specified by name, one-third for the wife and the other two-thirds for such child or for such children, who will sub-divide equally ; if for the benefit of children only generally, equally between the children of the parent whose life was insured, whether issue of the same or different marriages ; and if for the benefit of several children specified by name, equally between them.

10. When any child, specified by name or included generally,

predeceases the person whose life is insured, the descendants of such predeceased child will take his or her share by representation.

11. When the insurance is effected or the appropriation is made, without apportionment, in favour of several children, whether it be jointly with a wife or in favour of children alone, if any of such children predecease the person whose life is insured, without issue, accretion takes place in favour of the surviving children. When the insurance effected or appropriation made without apportionment is in favour of a wife and a child or children, if the wife predeceases her husband, accretion takes place in favour of the child or children; and if the child or all the children predecease the husband, accretion takes place in favour of the wife.

12. *It shall nevertheless be lawful for any person who has effected an insurance, or who has appropriated a policy of insurance, for the benefit of a wife, or a wife and child or children, or of a child or children only, as hereinbefore provided, at any time and from time to time thereafter to revoke the benefit conferred by such insurance or appropriation, either as to one or more or as to all the persons intended to be benefited; and to declare in the revocation that the policy shall be for the benefit only of the persons not excluded by the revocation, or for the benefit of such persons not excluded jointly with another or others not originally named or benefited. Such other or others must be a person or persons for whose benefit an insurance may be effected or appropriated under the provisions of this Act.*

13. *Either such revocation may be made by an instrument to be attached to the policy and of which a duplicate must be filed with the company which issued the policy, and a note of the filing of which duplicate must be endorsed by the company on the policy or on the instrument retained, or such revocation may be made by will, of which, after the party's death, an authentic copy must be filed with the company; and in default of such duplicate or such copy being filed, the company will be validly discharged by paying the insurance money according to the terms and directions of the policy, or of the declaration, or of a previous revocation. (Repealed by 58 Vic. c. 26, s. 4 (Man.), 1895, and the following substituted: 12. Any revocation of any appropriation under this Act may be effectually made in the same manner as it is hereinafter provided that an appropriation may be made.*

14. The benefit of the policy shall revert to the insured when the child for whose benefit it was effected or appropriated, or the

surviving child for whose benefit solely it exists, dies without issue before him or her ; or when the wife for whose benefit solely it exists, whether by the policy, appropriation or revocation or by accretion, predeceases her husband with or without issue ; and the benefit of any share in an apportionment shall likewise revert to the insured when the child to whom it was apportioned dies without issue before the insured parent, or when the wife to whom it was apportioned predeceases her husband with or without issue.

15. When a policy reverts to the insured in whole or for a share or shares, the insured may deal with such policy, or share or shares, as if the insurance had been effected and been always held for his or her own benefit.

16. The insurance effected or appropriated for the benefit of a wife, or of a wife and child or children, or of a child or children only, may be made payable by the application or policy, or by the declaration of appropriation, or by revocation, either to trustees, or to the party or parties benefited.

17. When no trustee or trustees is or are appointed by the application and policy, or by the declaration of appropriation, or by a revocation, it shall be lawful for any person whose life is insured, by an instrument to be attached to the policy, and of which a duplicate must be filed with the company which issued the policy, and such filing be noted by the company upon the instrument retained, or by will, of which after the testator's death an authentic copy must be filed with the company, to appoint a person or persons as trustee or trustees for the party or parties benefited or for any of them.

18. When the person whose life is insured shall die without having appointed a trustee or trustees for any minor child or children benefited, or for any person or persons benefited otherwise incapable of exercising his, her or their rights, the payment of the insurance money coming to such minor child or children, or person or persons otherwise incapable of exercising his, her or their rights, shall be made to the executor or executors of such insured person, who shall be the trustee or trustees of such minor child or children, or person or persons otherwise incapable of exercising his, her or their rights. In case of no trustee or trustees or of the executor or executors refusing to accept, or in case the person whose life is insured should die intestate, the payment shall be made to the guardian of such minor child or children, or the curator of such

persons otherwise incapable of exercising his, her or their rights. In case the trustee or trustees of a person or persons in the exercise of his, her or their rights should refuse to accept, the payment shall be made to such benefited person or persons, himself, herself or themselves.

19. The payment made to any benefited person or persons not incapable of exercising his, her or their rights, to any trustee or trustees, to any executor or executors, or to any guardian or curator, shall be a valid and sufficient discharge to the insurance company for the insurance money so paid ; and the company shall not be bound to see to the investment of the money, or be liable for the subsequent misapplication thereof by any trustee or trustees, executor or executors, guardian or curator.

20. The trustee or trustees shall pay over the insurance money received for persons in the exercise of their rights to such persons at once, if no conditions have been imposed by the insured in and by the policy itself, by the declaration of appropriation or by the terms contained in a deed of revocation ; if conditions have been imposed, the trustee or trustees shall carry out the trust and administer and pay over the insurance money in accordance with its provisions. The insurance money received by any trustee or trustees, executor or executors, guardian or curator for persons in minority or otherwise incapable of exercising their rights, shall be invested by the party or parties receiving it in Dominion or Provincial stock or debentures, or in municipal stock or debentures, or on first privilege or mortgage upon real estate, with power, however, to such trustee or trustees, executor or executors, guardian or curator, from time to time, to alter, vary and transpose the investments held, within the authority given herein, according to the nature of the securities or investments.

21. All or any part of the annual income arising from the investments of the insurance money may be applied towards the maintenance and education of such minor child or children, or towards the maintenance of such person or persons otherwise incapable of exercising his, her or their rights, as the trustee or trustees, executor or executors, guardian or curator, may think fit ; and when all the said annual income is not so applied the surplus shall be capitalized and invested in the same manner as the insurance money received.

22. The investment shall be transferred by the trustee or

trustees, executor or executors, guardian or curator, in the case of a minor, to himself or herself when he or she attains maturity unless conditions have been imposed, in which case the investment shall only be transferred in accordance with such conditions, and, in the case of a person otherwise incapable of exercising his or her rights, to himself or herself when he or she regains their exercise, or to his or her heirs when he or she dies without regaining their exercise, unless conditions have been imposed, in which case they shall be carried out. It shall, nevertheless, be lawful, should the trustee or trustees, executor or executors, guardian or curator think fit, to advance the insurance money, or to dispose of the investment and advance the proceeds, to any minor child during his or her minority, for the establishment, advancement or preferment in the world, or for the settlement in marriage, of such child, except in so far as they have been restricted by any instrument, or by any order or authority, under which they may have been appointed.

23. If a person who has effected or appropriated an insurance for the benefit of a wife, or of a wife and child or children, or of a child or children only, shall find himself or herself unable to meet the premiums, it shall be lawful for him or her to surrender the policy to the company which granted the same, and to accept in lieu therefor a paid-up policy for such sum as the premiums paid up may represent, and for the company to accept such surrender and grant such paid-up policy, payable at the time and in the manner and for the benefit of the person or persons mentioned in the original policy; and the share of each person, when more than one are benefited, will then be proportionately reduced.

24. Any person having effected the insurance with profits may receive the profits for his own benefit, or may from time to time, either apply the same in payment or reduction of premiums or direct them to be added to the insurance money; and the share of each person, when more than one is benefited, will in the last case be proportionately increased. Profits accruing after a policy has been paid up may be received by the insured for his own benefit, or may be added to the insurance money; and the share of each person, when more than one are benefited, will then also be proportionately increased.

25. It shall be lawful for any person who has effected or appropriated an insurance for the benefit of a wife and child or children, or of a child or children only, and who finds himself or

herself unable to continue to meet the premiums, from time to time to borrow, on the security of the policy, such sums as may be necessary to keep the policy in force; and the loans shall be evidenced by a writing, of which a duplicate must be filed with the company which issued the policy and such filing be noted by the company on the duplicate retained by the lender. Such loans shall be secured by privilege on the policy, and the company shall retain a sufficient amount to pay them from the insurance money. If such loans be paid before the death of the issuer, the acquittance shall be filed with the company.

26. Policies effected or appropriated for the benefit of a wife and child or children, or of a child or children only, or of a wife only, shall be exempt from attachment for debts due either by the insured or by the persons benefited, and shall be assignable by any of such parties, save during minority, and the insurance money, while in the hands of the company, shall be free from and be unattachable for the debts either of the insured or of the person or persons benefited, and shall be paid according to the terms of such policies, or of any declaration of appropriation, or of any revocation relating to the same. Such exception shall not apply to any policy or to any share or shares of a policy, which may have reverted to and been held by the insured. (As amended by 58 Vic, c. 26, s. 5 (Man.), 1895.)

27. The insurance money shall not be deemed to form part of the ordinary estate of the person whose life was insured, and its receipt by any person benefited shall not render him responsible for the liabilities of the estate of such person.

28. Nothing contained in this Act shall be held or construed to restrict or interfere with any right otherwise allowed by law to any person to effect or transfer a policy for the benefit of a wife or children, nor shall apply to insurance made in favour of, or transferred to, any wife under her marriage agreement.

243a. Revised Statutes of Manitoba, 1891, 55 Vic., Chapter 95—An Act respecting married women.—

1. This Act may be cited as "The Married Women's Act."

* * * * *

23. A married woman may effect an insurance on her own life or, with his consent, on that of her husband, for the term of her or his natural life or for any less period, for the benefit of her heirs or herself, or for such uses and subject to such trusts as she

may, at any time, declare in writing respecting the same, without any assent or concurrence of her husband, except as aforesaid, as if she were a *feme sole* and unmarried.

24. Any married woman may become a stockholder or member of any bank or insurance company or any other incorporated company or association, as fully and effectually as if she were a *feme sole*, and may vote by proxy or otherwise, and enjoy the like rights as other stockholders or members.

* * * * *

26. Nothing hereinbefore contained, in reference to moneys deposited, or investments made, by any married woman, shall, as against creditors of the husband, give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this Act had not been passed.

The Act 58 Vic., c. 26 (Man.) 1895, referred to above, § 243, applies under its section 6 to policies heretofore issued as well as to policies hereafter to be issued.

It also provides by section 2 that a policy or written contract of life insurance effected by any woman on her own life, and expressed to be for the benefit of her husband and children, or any of them shall be deemed a trust in favour of the objects therein named, and the moneys payable under such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the deceased, or be subject to her debts.

(2.) Whatever a man may lawfully do in respect of insurance effected upon his life, may under the like circumstances be done by a woman in respect of insurance effected upon her life ; and the like rules of construction shall prevail.

244. New Brunswick Legislation—58 Vic., Chapter 25, 1895—An Act to secure to wives and children the benefit of life insurance.—

1. "Maturity of the policy," or "maturity of the contract" in this Act shall mean the happening of the event or the expiration of the term at which the benefit under the policy or contract becomes due.

2. The expressions "contract of insurance," "policy of insurance," and "policy," whenever they occur in this Act include any certificate or contract hereinafter mentioned, or in any way relating to life insurance.

3. The provisions of this Act shall apply to every lawful contract of insurance in writing now in force or hereafter effected which is based on the expectation of human life, and shall include life insurance on the endowment plan, as well as every other, and shall also extend to the said contracts of insurance where any declaration endorsed thereon or attached thereto, though made before the passing of this Act, would be within the operation and provisions of this Act, if the same had been made subsequent thereto. Such provisions shall likewise extend and apply to membership, beneficiary and other certificates and contracts relating to life insurance, issued or entered into by any society or association of persons, for any fraternal, provident, benevolent, industrial, or religious purpose, among the purposes of which is the insurance of the lives of the members thereof exclusively, or by any association for the purpose of life insurance formed in connection with any such society or organization, and from its members, and which insures the lives of such members, including certificates or contracts heretofore issued or entered into.

4. Any person may insure his life for the whole term thereof, or for any definite period, for the benefit of his wife, or of his wife and children, or of his wife and some one of his children, or of his children only, or of some or one of them, and, where the insurance is effected for the benefit of more than one, he may apportion the amount of the insurance money as he may deem proper.

5. The insurance may be effected either in the name of the person whose life is insured or of any other person, with the assent of such other person as trustee.

6. (1). In case a policy of insurance effected by a man on his life is expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, or of his children alone, or any of them, or in case he has heretofore endorsed or may hereafter endorse, or by any writing identifying the policy by its number or otherwise, has made or may hereafter make a declaration that the policy is for the benefit of his wife, or of his wife and children, or any of them, or of his children alone, or any of them, such policy shall enure and be deemed a trust for the benefit of his wife for her separate use, or of his wife and children, or of his children, or any of them, according to the intent so expressed or declared, and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the

husband or his creditors except as hereinafter provided, or form part of his estate when the sum secured by the policy becomes payable ; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration

(2). In the case of a policy or written contract of life insurance effected before marriage a declaration under this section shall be and be deemed to have been as valid and effectual as if such policy or contract had been effected after marriage, but nothing herein contained shall affect any action or proceeding now pending ;

(3). When a contract of life insurance is effected by an unmarried man for the benefit of his future wife or future wife and children, or future children, but the contract does not designate by name, or otherwise clearly ascertain a specific person as such intended wife, the contract (not being within the intent of subsections 4 and 5 hereof) shall be construed as provided in section 8 of this Act ;

(4). When a contract of life insurance is effected as in subsection 3 of this section, but at the maturity of the contract the insured is still unmarried, or is a widower, or in case the insurance is for the benefit of children only, is a widower without issue, the insurance money shall fall into and become part of the estate of the insured ;

(5). When a contract of life insurance is effected by an unmarried man for the benefit of his future wife or future wife and children, and the intended wife is designated by name, or is otherwise clearly ascertained in the contract of life insurance, but the intended marriage does not take place, all questions arising on such contract shall be determined as if this Act had not been passed.

7. (1). The insured may, by an instrument in writing attached to or endorsed on or identifying the policy by its number or otherwise, vary a policy or a declaration of an apportionment previously made, so as to restrict or extend, transfer or limit the benefits of the policy to the wife alone or the children, or to one or more of them, although the policy is expressed or declared to be for the benefit of the wife and children, or of the wife alone, or for the child or children alone or for the benefit of the wife for life and of the children after her death, or for the benefit of the wife, and in case of her death during the life of the insured, then for the child or children, or any of them, or for the benefit of any one or more of the above mentioned persons for life, and after his or their

decease, for the benefit of any one or more of the survivors; or although a prior declaration was so restricted; and he may also apportion the insurance money among the persons intended to be benefited; and may, from time to time, by an instrument in writing attached to or endorsed on the policy or referring to the same, alter the apportionment as he deems proper; he may also by his will, make or alter the apportionment of the insurance money; and an apportionment made by his will shall prevail over any other made before the date of the will, except so far as such other apportionment has been acted on before notice of the apportionment by the will.

(2). This section shall apply to policies heretofore issued as well as to future policies.

8. Where an apportionment is made, all persons entitled to be benefited by the insurance shall be held to share equally in the same; and where it is stated in the policy or declaration that the insurance is for the benefit of the wife and children generally, or of the children generally, without specifying the names of the children, the word "children" shall be held to mean all the children of the insured living at the maturity of the policy, whether by his then or any former wife, and the wife to be benefited by the policy shall be the wife living at the maturity thereof.

9. Where an apportionment as herein provided for has been made, if one or more of the persons in whose favour the apportionment has been made, die in the lifetime of the insured, the insured may by an instrument in writing attached to or endorsed on or otherwise referring to and identifying the policy of insurance, declare that the share formerly apportioned to the person so dying shall be for the benefit of such other person or persons, as he may name in that behalf, not being other than the wife and children of the insured, or one or more of them, and in default of such declaration, the share of the person so dying shall be the property of the insured, and may be dealt with and disposed of by him as he may see fit, and shall at his death form part of his estate.

10. Where no apportionment as herein provided for has been made, if one or more of the persons entitled to the benefit of the insurance die in the lifetime of the insured, and no apportionment is subsequently made by the insured, the insurance shall be for the benefit of the survivor, or of the survivors of such persons in equal shares, if more than one; and if all the persons so entitled die in

the lifetime of the insured, the policy and insurance money shall form part of the estate of the insured or after the death of all the persons entitled to such benefit, the insured may by an instrument executed as aforesaid, make a declaration that the policy shall be for his then or any future wife or children, or some or one of them.

11. When the insurance money becomes due and payable, it shall be paid according to the terms of the policy, or any declaration or instrument as aforesaid, as the case may be, free from the claims of any creditors of the insured, except as herein provided.

12. The insured may, by the policy or by his will, or by any writing under his hand, appoint a trustee or trustees of the money payable under the policy, and may from time to time revoke such appointment in like manner, and appoint a new trustee or new trustees and for the investment of the moneys payable under the policy. Payment made to such trustee or trustees shall discharge the company.

13. If no trustee is named in the policy or appointed as mentioned in section 12 to receive the shares to which infants are entitled, their share may be paid to the executors of the last will and testament of the insured, or to a guardian of the infants duly appointed, or to a trustee appointed by the Supreme Court in Equity, upon the application of the wife or of the infants or their guardian; and such payment shall be a good discharge to the insurance company.

14. Any trustee named as provided for in the last preceding two sections, and any executor or guardian, may invest the money received in Government securities or municipal debentures, or in any other manner authorized by the will of the insured, or by the Supreme Court in Equity, and may from time to time alter and vary and transpose the investments and apply all or any part of the annual income arising from the share or presumptive share of each of the children, in or towards his or her maintenance or education, in such manner as the trustee, executor or guardian thinks fit, and may also advance to or for any of the children, notwithstanding his or her minority, the whole or any part of the share of the child of and in the money for the advancement or preferment in the world for such child, or on the maturity of such child.

15. The guardian, under section 13, shall give security to the satisfaction of the court appointing him, or a judge thereof, for the faithful performance of his duties as guardian, and for the proper

application of the money which he may receive. Where the amount of the insurance money payable to a guardian of infants does not exceed four hundred dollars, and probate is sought in respect of a will, for the sole purpose of obtaining insurance money to an amount not exceeding four hundred dollars, the fees payable on the appointment of such executor shall be eight dollars and no more, and such fees shall be apportioned between the judge, registrar and proctor, as directed by the Judge of Probate.

16. (1). If there is no trustee, executor or guardian competent to receive the share of any infant in the insurance money, and the insurance company admit the claim, or any part thereof, the company at any time after the expiration of two months from the date of their admission of the claim, or the part thereof, may obtain an order from the Supreme Court in Equity for the payment of the share of the infant into court, and in such case the cost of the application shall be paid out of the share (unless the court otherwise directs) and the residue shall be paid into court pursuant to the order, and such payment shall be a sufficient discharge to the company for the money paid ; and the money shall be dealt with as the court may direct ;

(2). If the company does not, within four months from the time the claim is admitted, either pay the same to some person competent to receive the money under this Act, or pay the same into the Supreme Court in Equity, the said court may, upon application made by some one competent to receive the said money on behalf of the infant, order the insurance money, or any part thereof, to be paid to any trustee, executor or guardian competent to receive the same, or to be paid into court, to be dealt with as the court may direct, and any such payment shall be a good discharge to the company ;

(3). The court may order the costs of the application, and any costs incidental to establishing the authority of the party applying for the order, to be paid out of such moneys, or by the company, or otherwise, as may seem just, and the court may also order the costs of and incidental to obtaining out of court money voluntarily paid in by a company to be paid out of such money.

17. If a person who has heretofore effected or who hereafter effects insurance for the purposes contemplated by this Act, whether the purpose appears by the terms of the policy or by endorsement thereon or by an instrument referring to and identifying the

policy, finds himself unable to continue to meet the premiums, he may surrender the policy to the company and accept in lieu thereof a paid-up policy for such sum as the premiums paid would represent, payable at death or at the endowment age, or otherwise, as the case may be, in the same manner as the money insured by the original policy, if not surrendered, would have been payable, and the company may accept the surrender and grant a paid-up policy, notwithstanding any declaration or direction in favour of the wife or children, or either of them.

18. The person insured may, from time to time, borrow from the company insuring, or from any other company or person, on the security of the policy, such sums as may be necessary, and which shall be applied to keep the policy in force, and on such terms and conditions as may be agreed on; and the sums so borrowed, together with such lawful interest thereon as may be agreed, shall, as long as the policy remains in force, be a first lien on the policy, and on all moneys payable thereunder, notwithstanding any declaration or direction in favour of the wife or children, or any or either of them.

19. Any person insured under the provisions of this Act may, in writing, require the insurance company to pay the bonuses or profits accruing under the policy, or portions of the same, to the insured, or to apply the same in reduction of the annual premiums payable by insured in such way as he may direct, or to add the said bonuses or profits to the policy; and the company shall pay or apply such bonuses or profits as the insured directs, and according to the rates and rules established by the company; provided always that the company shall not be obliged to pay or apply such bonuses or profits in any other manner than stipulated in the policy or the application therefor. This section shall apply to policies made before the passing of this Act and to bonuses and profits then declared in respect of such policies, as well as to policies hereafter to be made.

20. In case of several actions being brought for insurance money, an order may be made consolidating the actions, or otherwise dealing with them. If any action is brought for the share of one or more infants entitled, all the other infants entitled, or the trustees, executors or guardians entitled to receive payment of the shares of such other infants, shall be made parties to the action, and the rights of all the infants shall be dealt with and determined

in one action. The persons entitled to receive the shares of the infants may join with any adult persons claiming shares in the policy. In all actions where several persons are interested in the money; the court or the judge thereof shall apportion among the parties entitled any sum directed to be paid, and shall give all necessary directions in respect thereof.

21. The provisions of sections 13, 16 and 20 of this Act shall extend and apply to cases where the insured died before the passing of this Act, as well as to cases arising subsequent thereto.

22. No declaration or apportionment affecting the insurance money, or any portion thereof, nor any appointment or revocation of a trustee, shall be of any force or effect, as respects the company, until the instrument or a duplicate, or a copy thereof, is deposited with the company.

23. If the policy was effected and premiums paid by the insured with intent to defraud his creditors, the creditor shall be entitled to receive out of the sum secured an amount equal to the premiums so paid with interest thereupon.

24. Nothing contained in this Act shall be held or construed to restrict or interfere with the rights of any person to effect or assign a policy for the benefit of his wife and children, or some or one of them, in any other mode allowed by law.

25. Where all the persons entitled to be benefited under any policy, whether by original insurance, written declaration or instrument of variation or apportionment under any policy, are of full age, they and the person insured may surrender the policy or assign the same, either absolutely or by way of security.

26. Where any policy of insurance, or the declaration endorsed upon or attached to or identifying by its number or otherwise any policy of insurance to which this Act applies, whether such declaration has heretofore been or shall hereafter be made, provides that the policy shall be for the benefit of a person, and in the event of the death of such person, for the benefit of another person, such first mentioned person shall, if living, be deemed, for the purposes of section 25 of this Act, the person entitled to be benefited under such policy.

245. Statutory Enactments—Province of Prince Edward Island—35 and 36 Vic., Chapter 30—An Act relating to Life Assurance.—

Be it enacted, that it shall be lawful for any person to insure

his life for the whole term thereof, or for any definite period, for the benefit of his wife, or of his wife and children, or of his children only, or some or one of them, and to apportion the amount thereof as he may deem proper, where the insurance is effected for the benefit of more than one.

2. The said insurance may be effected either in the name of the person whose life is insured, or in the name of his wife, or of any other person, with the assent of such other person or trustee, and the premium on any policy of insurance effected under this Act, shall be payable during the whole of the said person's life, or during any less period, by annual, half-yearly, quarterly or monthly payments.

3. When no apportionment is made in any such policy, all parties interested in the said insurance shall be held to share equally in the same, and the word "children," in any such policy, shall be held to mean all the children of the person whose life is insured, living at the time of his death, whether by his marriage at the time of effecting such policy, or by any subsequent marriage.

4. Upon the death of the person whose life is insured, the insurance money due upon the policy shall be payable according to the terms of the policy, free from the claims of any creditor or creditors whomsoever, notwithstanding the bankruptcy or insolvency of the person so insured.

5. It shall be competent for the insurance company granting such policy to pay the amount due thereon to any child or children, being under age, into the hands of the executor or executors, administrator or administrators of such person so insured, or to the guardian of such children legally constituted, who shall hold the same as trustees for such minor children, and the receipt of such executor, administrator or guardian shall be a sufficient discharge to the insurance company or association.

6. It shall be lawful for such executor, administrator or guardian to invest the moneys so received, in Government or real securities, and to alter, vary and transpose the same, and to apply all or any part of the annual income arising therefrom in or towards the maintenance and education of such minor child or children, and also to advance unto and for each of such children, his or her share or presumptive share in such trust moneys for the educa-

tion, advancement or preferment in the world, or on the marriage of any such child, notwithstanding his or her minority.

7. Any person insuring with profits may apply the same either in payment of premiums, or direct them to be added to the insurance money payable at death.

CHAPTER IX.

CONDITIONS OF POLICIES, INCLUDING STATUTORY CONDITIONS AND THEIR VARIATIONS.

246. GENERAL REMARKS ON CONDITIONS OF POLICIES.

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265. LEVY ON PROPERTY INSURED—EXECUTION AGAINST BUILDINGS—*PL. M.A. DE BONIS ET DE TERRIS*.

266. CONDITIONS AS TO CANCELLATION BY NOTICE, ETC.—IMMEDIATE CANCELLATION NOT VALID—REPAYMENT OF UNEARNED PREMIUMS A CONDITION PRECEDENT—AN ENGLISH CONSTRUCTION AS TO RIGHT OF COMPANY TO CANCEL—NOTICE TO BROKER—PARTNER'S CONSENT—ACTUAL TENDER OF PREMIUM UNNECESSARY—WHEN ACTUAL TENDER OF PREMIUM IS NECESSARY—CANCELLATION ON "REQUEST" OF ASSURED.

246. General remarks on conditions of policies.—The conditions upon which the contract of insurance is based are either stated expressly or tacitly understood. A non-compliance with

them may, according to the circumstances of the case, modify, suspend or entirely annul the obligation of the insurer. They may be positive or negative. If the former, a certain thing must happen or be done ; if the latter, it must not happen or must not be done.¹

247. Statutory conditions in the different provinces.—In Quebec (as in the other provinces until statutory conditions were enacted in some of them) any condition, however hard or unreasonable, may be endorsed on a policy, provided always that it be not contrary to public order or good morals.² Under the Ontario Insurance Act,³ the Manitoba Fire Insurance Policy Act⁴ and the British Columbia Fire Insurance Policy Act, 1898,⁵ statutory conditions are enacted which are deemed as against the insurers⁶ to be a part of every fire insurance contract entered into subsequent to those statutes or renewed or otherwise in force in those provinces.

There are as yet no statutory conditions in Quebec, though the Civil Code of Lower Canada contains some of the enactments found among the statutory conditions of the other provinces. An analysis of these statutory conditions shows clearly the protection they afford to the insured, and their enactment in Quebec would seem well worth the consideration of the legislature of that province. These conditions were carefully drawn in Ontario by Mr. Hunter, and their enactment there seems to have served as a basis for their adoption in Manitoba and British Columbia. The Ontario statutory conditions are printed herein at length.⁷

Statutory conditions were first enacted in Ontario by the Uniform Conditions Act of 1876. In 1880, the Supreme Court of Canada⁸ decided that the Uniform Conditions Act did not apply to mutual insurance companies.⁹ In 1881, by 44 Vic. c. 20 (Ont.) s. 28, the statutory conditions were made applicable to such companies. In *Parsons v. Citizens Ins. Co.*¹⁰ it was decided that the statutory conditions affected all policies of fire insurance made in Ontario whether the insuring companies were incorporated or licensed by the province or otherwise.

45 Vic. c. 20 (Ont.) ss. 2, 3, 4, extended the statutory conditions to oral contracts of fire insurance.

¹ 13 L. N. 255. ² C. C. L. C. 990. ³ 60 Vic. c. 36. ⁴ R. S. M. 1891, 55 Vic. c. 50.

⁵ 56 Vic. c. 12 (B.C.), 53 Vic. c. 22 (B.C.). ⁶ But see *infra* § 252c. ⁷ *Infra* § 248.

⁸ *Mutual Fire Insurance Co. of Wellington & Frey*, 5 S.C.R. 82.

⁹ See also *infra* § 257a, *Ballagh v. Royal Mut. F.I.C.*, 5 A. R. 87.

¹⁰ L. R. 7 App. Cases 96.

The Ontario Uniform Conditions Act was adopted in Manitoba in 1888, and in British Columbia in 1893. There are no provisions of this sort in any of the other provinces, nor in Great Britain, where the fire insurance companies are left at large to make what contracts they please with their customers.¹

Variations from and additions to the statutory conditions must be drawn attention to in the policy, and these variations must be held just and reasonable by the court which is asked to apply them.

The reasonableness of a variation to the statutory conditions is to be tested with relation to the circumstances at the time the policy is issued, and not in the light of those existing at the time at which the condition is sought to be applied.²

It has also been said that variations making the policy more onerous than the statutory conditions would have done, are to be treated as *prima facie* unreasonable, but this principle has not yet been clearly decided.³ The question whether a variation is just and reasonable may be raised on appeal, although not raised at the trial.⁴

248. Statutory conditions and provisions relating thereto, binding all fire insurance contracts whatsoever in Ontario.⁵

168. *Statutory conditions to be part of every policy unless varied.*—The conditions set forth in this section shall, as against the insurer,⁶ be deemed to be part of every contract, (whether sealed, written or oral,) of fire insurance hereafter entered into or renewed or otherwise in force in Ontario with respect to any property therein or in transit therefrom or thereto, and shall be printed on every such policy with the heading *Statutory Conditions*, and no stipulation to the contrary, or providing for any variation, addition or omission, shall be binding on the assured unless evidenced in the manner prescribed by sections 169 and 170. R.S.O. 1887, c. 167, s. 114.

(1) *Misrepresentation or omission.*—If any person or persons insures his or their buildings or goods, and causes the same to be described otherwise than as they really are, to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance

¹ MacLennan, *Fire Ins. Law Ont.*, 6.

² *McKay v. Norwich Ins. Co.*, 27 O.R. 251, and *Ballagh v. Royal Mut. F. I. Co.*, 5 A.R. 87, reported *infra* § 257a.

³ *McKay v. Norwich Ins. Co.*, 27 O.R. 251, see also *infra* § 249.

⁴ 15 A.R. 363, *Reddick v. Saugeen*, referred to *infra* §§ 249, 258, and reported *infra* § 252b.

⁵ 60 Vic. c. 36 (O). ⁶ But see *infra* § 252c.

shall be of no force in respect to the property in regard to which the misrepresentation or omission is made. R.S.O. 1887, c. 167, s. 114 (1).

(2) *Policy sent to be deemed as applied for unless variance pointed out.*—After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out, in writing, the particulars wherein the policy differs from the application. R.S.O. 1887, c. 167, s. 114 (2).

(3) *When a change as to risk shall avoid a policy. Notice of change, etc.*—Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force. R.S.O. 1887, c. 167, s. 144 (3).

(4) *Change of property.*—If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorized for such purpose, the policy shall hereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death. R.S.O. 1887, c. 167, s. 114 (4).

(5) *Partial damage—salvage.*—Where property insured is only partially damaged, no abandonment of the same will be allowed unless by the consent of the company or its agent; and in case of removal of property to escape conflagration, the company will contribute to the loss and expenses attending such act of salvage proportionately to the respective interests of the company or companies and the assured. R.S.O. 1897, c. 167, s. 114 (5).

(6) *Money, securities, etc.*—Money, books of account, securities for money, and evidences of debt or title are not insured. R.S.O. 1887, c. 167, s. 114 (6).

(7) *Plate, paintings, clocks, etc.*—Plate, plate glass, plated ware, jewellery, medals, paintings, sculptures, curiosities, scientific and musical instruments, bullion, works of art, articles of virtue, frescoes, clocks, watches, trinkets and mirrors are not insured unless mentioned in the policy. R.S.O. 1887, c. 167, s. 114 (7).

(8) *Prior or subsequent insurance.*—The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected by any other company, unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected. R. S. O. 1887, c. 167, s. 114 (8).

(9) *Case of assent to other insurance.*—In the event of any other insurance on the property herein described, having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage without reference to the dates of the different policies. R.S.O. 1887, c. 167, s. 114 (9).

(10) The company is not liable for the losses following, that is to say :

(a) *Liability in case of non-ownership.*—For the loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy. R.S.O. 1887, c. 167, s. 114 (10) (a).

(b) *Riot, invasion, etc.*—For loss caused by invasion, insurrection, riot, civil commotion, military or usurped power. R.S.O. 1887, c. 167, s. 114 (10) (b).

(c) *Chimneys, ashes, stoves.*—Where the insurance is upon buildings or their contents—for loss caused by the want of good and substantial brick or stone chimneys; or by ashes or embers being deposited, with the knowledge and consent of the assured, in wooden vessels; or by stoves or stovepipes being, to the knowledge of the assured, in an unsafe condition or improperly secured. R.S.O. 1887, c. 167, s. 114 (10) (c).

(d) *Goods to which fire heat is being applied.*—For loss or damage to goods destroyed or damaged while undergoing any process in or by which the application of fire heat is necessary. R.S.O. 1887, c. 167, s. 114 (10) (d).

(e) *Repairs by carpenters, etc.*—For loss or damage occurring to buildings or to their contents while the buildings are being repaired by carpenters, joiners, plasterers or other workmen, and in

consequence thereof, unless permission to execute such repairs has been previously granted in writing, signed by a duly authorized agent of the company. But in dwelling houses fifteen days are allowed in each year for incidental repairs, without such permission. R.S.O. 1887, c. 167, s. 114 (e).

(f) *Gunpowder, coal oil, etc.*—For loss or damage occurring while petroleum, or rock-earth or coal oil, camphene, gasoline, burning fluid, benzine, naphtha or any liquid products thereof, or any of their constituent parts (refined coal oil for lighting purposes only, not exceeding five gallons in quantity, or lubricating oil not being crude petroleum nor oil of less specific gravity than required by law for illuminating purposes, not exceeding five gallons in quantity, excepted), or more than twenty-five pounds weight of gunpowder is or are stored or kept in the building insured or containing the property insured, unless permission is given in writing by the company. R.S.O. 1887, c. 167, s. 114 (10) (f).

(11) *Explosion—Lightning.*—The company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion or by lightning. R.S.O. 1887, c. 167, s. 114 (11).

(12) *Proof of loss when payable to other than assured.*—Proof of loss must be made by the assured, although the loss be payable to a third party. R.S.O. 1887, c. 167, s. 114 (12).

(13) *Directions to be observed on making claim.*—Any person entitled to make a claim under this policy is to observe the following directions :

(a) He is forthwith after loss to give notice in writing to the company. R.S.O. 1887, c. 167, s. 114 (13) (a).

(b) He is to deliver, as soon after as practicable, as particular an account of the loss as the nature of the case permits. R.S.O. 1887, c. 167, s. 114 (13) (b).

(c) He is also to furnish therewith a statutory declaration declaring :—

(1) That the said account is just and true.

(2) When and how the fire originated, so far as the declarant knows or believes.

(3) That the fire was not caused through his wilful act or neglect, procurement, means or contrivance.

(4) The amount of other insurances.

(5) All liens, and incumbrances on the subject of insurance.

(6) The place where the property insured, if movable, was deposited at the time of the fire. R.S.O. 1887, c. 167, s. 114 (13) (c).

(d) He is in support of his claims, if required and if practicable, to produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers; to furnish copies of the written portion of all policies; to separate as far as reasonably may be the damaged from the undamaged goods, and to exhibit for examination all that remains of the property which was covered by the policy. R.S.O. 1887, c. 167, s. 114 (13) (d).

(e) He is to produce, if required, a certificate under the hand of a magistrate, notary public, commissioner for taking affidavits, or municipal clerk, residing in the vicinity in which the fire happened, and not concerned in the loss or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has by misfortune and without fraud or evil practice sustained loss and damage on the subject assured to the amount certified. R.S.O. 1887, c. 167, s. 114 (13) (e).

(14) *Proof of loss may be made by agent.*—The above proofs of loss may be made by the agent of the assured, in case of the absence or inability of the assured himself to make the same, such absence or inability being satisfactorily accounted for. R.S.O. 1887, c. 167, s. 114 (14).

(15) *False statement or fraud vitiates claim.*—Any fraud or false statement in a statutory declaration, in relation to any of the above particulars, shall vitiate the claim. R.S.O. 1887, c. 167, s. 114 (15).

(16) *Appraisement in case of differences.*—If any difference arises as to the value of the property insured, of the property saved, or of amount of the loss, such value and amount and the proportion thereof (if any) to be paid by the company shall, whether the right to recover on the policy is disputed or not, and independently of all other questions be submitted to the arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then to two persons, one to be chosen by the party assured and the other by the company, and a third to be appointed by the persons so chosen, or on their failing to agree, then by the County Judge of the county wherein the loss has happened; and such reference shall be subject to the provisions of the laws applic-

able to references in actions; and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and proportion to be paid by the company; where the full amount of the claim is awarded the costs shall follow the event; and in other cases all questions of costs shall be in the discretion of the arbitrators.

(17) *Loss when payable.*—The loss shall not be payable until sixty days after the completion of the proofs of loss, unless otherwise provided for by the contract of insurance. R.S.O. 1887, c. 167, s. 114 (17).

(18) *Company may replace, instead of paying.*—The company, instead of making payment, may repair, rebuild or replace, within a reasonable time, the property damaged or lost, giving notice of their intention within fifteen days after receipt of the proofs herein required. R.S.O. 1887, c. 167, s. 114 (18).

(19) *Insurance terminable on notice.*—The insurance may be terminated by the company by giving notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium for the unexpired term, calculated from the termination of the notice; in the case of personal service of the notice, five days' notice, excluding Sunday, shall be given. Notice may be given by any company having an agency in Ontario by registered letter addressed to the assured at his last post office address notified to the company, and where no address notified, then to the post office of the agency from which the application was received, and where such notice is by letter, then seven days from the arrival at any post office in Ontario shall be deemed good notice: And the policy shall cease after such tender and notice aforesaid, and the expiration of the five or seven days as the case may be. R.S.O. 1887, c. 167, s. 114 (19).

(a) The insurance, if for cash, may also be terminated by the assured by giving written notice to that effect to the company or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid. R.S.O. 1887, c. 167, s. 114 (19) a.

(20) *Waiver of condition.*—No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company, unless the waiver is clearly expressed in writing, signed by an agent of the company. R.S.O. 1887, c. 167, s. 114 (20).

(21) *Officers assuming to agree in writing to be deemed agents.*—An officer or agent of the company, who assumes on behalf of the company to enter into any written agreement relating to any matter connected with the insurance, shall be deemed *prima facie* to be the agent of the company for the purpose. R.S.O. 1887, c. 167, s. 114 (21).

(22) *Actions to be brought within one year.*—Every action or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred, unless commenced within the term of one year next after the loss or damage occurs. R.S.O. 1877, c. 162. Schedule R.S.O. 1887, c. 167, s. 114 (22).

(23) *What constitutes written notice.*—Any written notice to a company for any purpose of the statutory conditions, where the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post letter addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorized agent of the company. 50 V., c. 26, s. 114.

169. *Variations, how indicated.*—If the insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added on the instrument of contract containing the printed statutory conditions words to the following effect, printed in conspicuous type and in ink of a different colour. R.S.O. 1887, c. 167, s. 115.

Variations in Conditions.

“This policy is issued on the above Statutory Conditions with the following variations and additions :

“These variations (*or as the case may be*) are, by virtue of the Ontario Statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be enacted by the company.” R.S.O. 1887, c. 167, s. 115.

170. *Variations not binding unless clearly indicated.*—No such variation, addition or omission, shall, unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, be legal and binding on the assured; and no question shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, but on the contrary,

the policy shall, as against the insurer, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid. R.S.O. 1887, c. 167, s. 116.

Optional with insurers to pay claims void under certain statutory conditions.—Provided it shall be optional with the insurers to pay or allow claims which are void under the 3rd, the 4th, or the 8th Statutory Condition, in case the said insurers think fit to waive the objections mentioned in the said conditions. R.S.O. 1887, c. 167, s. 112.

171. *Policy containing other than statutory conditions*—In case a policy is entered into or renewed containing or including any condition other than or different from the conditions set forth in section 168 of this Act, if the said condition so contained or included is held, by the Court or Judge, before whom a question relating thereto is tried, to be not just and reasonable, such condition shall be null and void. R.S.O. 1887, c. 167, s. 117.

172.—(1) *If due proof of loss not given through accident, etc., or objection not made thereto, or made on other grounds than non-compliance with conditions.*—Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this Province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with ; or where after a statement or proof of loss has been given in good faith by or on behalf of the assured, in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions or does not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time ; or where, for any other reason, the Court or Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions—no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof (as the case may be) shall, in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into. R.S.O. 1887, c. 167, s. 118.

(2) *Allowance for costs occasioned by default of plaintiff.*—If in any action or proceeding upon a contract of fire insurance, the assured, being plaintiff in such action or proceeding, has in the opinion of the Court or Judge, wilfully neglected or unreasonably refused to furnish necessary information respecting the property for which the insurance money is claimed, and if as a consequence of such neglect or refusal, the defendant company has been at expense in obtaining information or evidence, the Court or Judge may, in disposing of costs, take into consideration the expense so incurred by the defendant company. 52 V. c. 31, s. 4.

173. *Appeal.*—A decision of a Court or Judge under this Act shall be subject to review or appeal to the same extent as a decision by such Court or Judge in other cases. R.S.O. 1887, c. 167, s. 119.

249. Variations of statutory conditions prima facie unjust and unreasonable.—In *Parsons v. Queen Ins. Co.*¹ it was laid down generally that any variation of the statutory conditions is *prima facie* unjust and unreasonable.² In the latter case it was pointed out that “unjust and unreasonable” is not an equivalent expression to “more onerous and burthensome.”

A varied condition must not, however, be more stringent than the statutory condition.³ In this last case it was held that the unreasonableness of a condition is to be tested with relation to the circumstances of each case at the time the policy is issued.⁴

In *May v. Standard*,⁵ Patterson, J. A., laid it down that “conditions dealing with the same subjects as those given by the statute, and being variations of the statutory conditions, should be tried by the standard afforded by the statute, and held not to be just and reasonable if they impose upon the insured terms more stringent or onerous or complicated than those attached by the statute to the same subject or incident.”

The Divisional Court may determine whether the condition was a just and reasonable one; it is not necessary that the question be first raised at the trial.⁶

¹ 2 O. R. 45, *infra* § 255, followed in *Smith v. City of London Ins. Co.*, 11 O. R. 38.

² But see *supra* § 247.

³ *Ballagh v. Royal Mutual F. I. C.*, 5 A. R. 87, *infra* § 257a.

⁴ See also *Butler v. Standard*, 4 A. R. 391; *Peoria Sugar Refining Co. v. Canada Fire & Marine Ins. Co.*, 12 A. R. 418.

⁵ 5 A. R. 622, referred to *infra* §§ 250 and 258.

⁶ *Reddick v. Saugeen Mutual Fire*, 15 A. R. 363, referred to *supra* § 247 and *infra* § 258, and reported *infra* § 282b.

249a. Variations must be indicated as prescribed by the Act.—Whatever may be the conditions sought to be imposed by insurance companies, no such conditions can avail against the statutory conditions, and the latter alone are deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated by variations in the manner prescribed by the Act.

The penalty for not observing that manner is that the policy becomes subject to the statutory conditions, whether printed or not.¹

250. Failure to print statutory conditions.—Where a company has printed its own conditions and failed to print the statutory ones, it is not the case that the policy must be deemed to be without any conditions at all.²

In an action on a fire policy, upon which the statutory conditions were not endorsed, but which was on the face declared to be subject to the company's conditions endorsed, the 11th of which was that the insured should do all in his power to save and protect the insured property, and prevent injury thereto, and by the 17th condition the non-fulfilment of these conditions entailed the forfeiture of the policy, the jury found specially, amongst other things, that the plaintiff wilfully neglected to save and prevented others from saving the insured property, whereby his goods were prevented from being saved, but they disagreed as to the defence of fraudulent overvaluation :—

Held, that under the decision of the Privy Council in *Parsons v. Citizens Insurance Company*,³ the policy must be taken to be a policy with the statutory conditions only; and a new trial was granted that the case might proceed as upon such a policy.⁴

By an additional condition of a policy of insurance, it was provided that if the insured property should be levied upon or taken into possession or custody under any legal process, or the title should be disputed in any proceeding in law or equity, the policy should cease to be binding upon the company. After the insurance was effected, an execution issued against the goods of

¹ *Citizens Ins. Co. v. Parsons*; *Queen Ins. Co. v. do.*, *supra* § 253a; as to compliance with stat. enact. as to printing see *Sands v. Standard Ins. Co.*, 27 Grant Chy. 167, reported *infra* § 259; and as to omission to fill up blank in condition see *Sears v. Agricultural Ins. Co.*, 32 C. P. 586, *infra* § 257.

² *Do.*

³ 7 App. Cas. 96. ⁴ *Devlin v. Queen Ins. Co.*, 46 Q. B. 611.

the insured, under which the bailiff made a formal seizure, but did not deprive the insured of their possession or custody, or place any one in possession, and upon a bond being given a day or two afterwards the seizure was withdrawn.

The Court of Common Pleas¹ held that this was a valid seizure, and that the plaintiff, who was mortgagee of the goods and to whom the loss was payable, could not therefore recover:—

Held, reversing this judgment, that the plaintiff was entitled to recover. Per Burton, Patterson and Morrison, J.J. A., that there had not been a seizure within the meaning of the condition, which refers to an actual custody and change of possession. Per Armour, J., that the condition was not binding on the insured, as it was not printed in compliance with R. S. O. (1877), c. 162, s. 4. *Wilson v. The Standard Fire Ins. Co.*² was followed and approved of.

Semble, per Patterson, J. A., that the condition was void, as being unjust and unreasonable. Remarks were made by Patterson, J. A., as to the principle and considerations upon which the validity of a variation of or addition to the statutory conditions should be tested and determined.³

251. Ont. Ins. Act applicable to all insurance contracts whatsoever.—In the statute 52 Vic. c. 82 (Ont.) “company” had the same meaning as in the Ontario Insurance Act and therefore did not include societies not requiring a license for any contract of insurance within the Ontario Insurance Act, before the passing of the Act. R.S.O. 1887, c. 167, sec. 2, (4) and 3.

The law now⁴ is general and includes any corporation or society, incorporated or unincorporated or any partnership, or any underwriter undertaking to effect any contract of insurance within the intent of the Act.

251a. Contract signed outside of Ontario but governed by statutory conditions.—A policy issued by a company whose head office is in Montreal, signed by the president there and countersigned by a local agent in Ontario, where the property insured is situate, is governed by the statutory conditions.⁵

¹ 30 C. P. 51. ² 29 C. P. 308.

³ *May v. Standard Fire Ins. Co.*, 5 A. R. 605, referred to *supra* § 249.

See also *infra* § 258.

⁴ Ont. Ins. Act 1897, 60 Vic., c. 36, s. 10.

⁵ *McIntyre v. National Ins. Co.* 44 U. C. Q. B. 501. See also 60 Vic., c. 36 (O), s. 143. *MacLennan*, 53 et seq.

But when the property insured is not in Ontario, the statutory conditions do not apply and the contract is simply what the parties have entered into.¹

252. All contracts of insurance in Ontario to have conditions set out in full.—Where any insurance contract made by any corporation whatsoever within the intent of the Ontario Insurance Act is evidenced by a sealed or written instrument, all terms and conditions of the contract shall be set out by the corporation in full on the face or back of the instrument forming or evidencing the contract.²

252a. Effect of non-compliance with above provision.—And if a term or condition is not set out as above, the liability of the insurer is not thereby impaired, but the term or condition, stipulation, warranty or proviso modifying the effect of the contract and so omitted, is invalid and inadmissible in evidence to the prejudice of the assured or the beneficiary.³

252b. Parallel provisions in Ins. Act of Canada.—The Insurance Act of Canada,⁴ contains parallel provisions respecting contracts of life insurance. “No condition, stipulation or proviso modifying or impairing the effect of any policy or certificate of life insurance issued after 1st January, 1886, by any company doing business within Canada under the authority of the Parliament of Canada, shall be good or valid unless such condition, stipulation or proviso is set out in full on the face or back of the policy.”⁵

In *Venner v. Sun Life Insurance Company*,⁶ however, the policy was issued “without conditions,” but expressly “sur les représentations, conventions et stipulations contenues dans la demande pour cette police.” These representations were proved to be false in the most material particulars, and it was held that the company never became bound under the policy. For it was a sufficient compliance with section 27 of the Insurance Act to refer in express terms in the policy to the stipulation contained in the application.

252c. Statutory conditions applicable to insurer and assured.—Although 60 Vic. c. 36 (O.) s. 168 enacts that the sta-

¹ *Cameron v. Canada Life Ass. Co.*, 6 O. R. 392.

² 60 Vic., c. 36, s. 144. ³ *Id.* ⁴ R. S. C. c. 124, s. 27, 28.

⁵ As to the constitutionality of this provision see *supra* § 38. ⁶ 17 S. C. R. 394, and reported *infra* § 281b.

tutory conditions shall be deemed to form part of the contract as against the insurer, it has been held in *Queen v. Parsons*¹ that they apply both as against the company and as against the assured.

253. Conflict or ambiguity in conditions—Construction contra proferentem.—In the case of ambiguity in the contract the construction most unfavorable to the insurer will be adopted, and properly, for by universal custom it is the insurer that prepares the contract and furnishes the language used.²

“No rule in the interpretation of a policy is more fully established or more imperative and controlling than that which declares that, in all cases, it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which, in making the insurance, it was his object to secure.”³

254. Condition in application in small type; calculated to elude observation.—In the application for insurance prepared by a company there was inserted in very small type a notice that the estimated value of personal property and of each building to be insured “must be stated separately,” etc., which had escaped the notice of the applicant, and such separate valuations, etc., were not given.

The Court being of the opinion that although this provision might not have been framed in order to elude observation it was certainly calculated to elude observation, refused to give the insurers the benefit of it, if under the circumstances it would have operated in their favor.⁴

255. Condition of policy as to quantity of gunpowder allowed.—The plaintiff applied for an insurance upon his stock-in-trade with the defendant company. Pending the negotiations the company's agent told the plaintiff he thought the company's condition was to allow twenty-five pounds of powder to be kept, and the plaintiff said he did not keep more than ten pounds. The insurance was then effected by an interim receipt, and on the same night the premises were burned.

¹ 7 App. Cas. 96, and referred to *supra* § 249a.

² Cooke, Life Ins. 3. ³ May 175, and *infra* § 264.

⁴ Greet v. Citizens' Ins. Co. 27 Chy. 121, and see Smith v. City of London Ins. Co. 11 O. R. 38, 15 S. C. R. 69; Cockburn v. British Am. Ass. Co. 19 O. R. 245.

The plaintiff had more than ten pounds, but less than twenty-five pounds of powder in stock when the fire occurred. The statutory condition prohibited more than twenty-five pounds being kept in stock without permission, and the company's variation of their condition relieved them from liability if more than ten pounds were "deposited on the premises, unless the same be specially allowed in the body of the policy and suitable extra premium be paid."

The case having been dealt with on other grounds, on an appeal to the Privy Council, was remitted to this court to try whether the variation of the condition was a just and reasonable one. The judge at the trial found it to be reasonable :—

Held, Hagarty, C.J., dissenting, that under the circumstances of this case, inasmuch as the company's agent had represented that twenty-five pounds of gunpowder were allowed to be kept in stock, the condition now insisted upon was not a just and reasonable one to be set up by the company, or one which they could have inserted in the policy, and was therefore void, and that the plaintiff should recover.

Per Armour, J.—The condition being more onerous than the statutory condition relating to the same subject matter, was for that reason to be deemed not just or reasonable.

Per Hagarty, C. J., and Galt, J.—The variation was not necessarily unjust or unreasonable. Per Hagarty, C. J.—The statutory condition exempting the company from liability if more than twenty-five pounds of gunpowder were kept without permission, does not preclude or prohibit the insurers from bargaining that they will not be liable if more than ten pounds be kept, except on certain conditions as to extra premium, etc.; and as the plaintiff at the trial did not in his evidence mention the representation of the agent, or allege that it influenced him, and it was not relied upon there, it should not now be given effect to.¹

255a. Condition as to loss by explosion—Gunpowder explosion.—A policy of insurance against fire contained a condition that "the company will make good a loss caused by the explosion of coal gas in a building not forming part of gas works and loss by fire caused by any other explosion or by lightning." A loss occurred by the dropping of a match into a keg of gunpowder on the

¹ *Parsons v. Queen Ins. Co.* 2 O. R. 45, Q.B.D., referred to *supra* § 249.

premises insured, the damage being partly occasioned by the explosion of the gunpowder setting fire to the stock insured. The company admitted their liability for the damage caused by fire, but not for that caused by the explosion.

Held, reversing the decision of the Court of Appeal,¹ which affirmed the decision of the C.P.D.² and the Q.B.D.³ *Taschereau, J., dubitante*, that the company were not exempt by the condition in the policy from the liability for damage caused by the explosion.

255b. Condition as to quantity of gunpowder allowed—Insurance of a steamer against fire—Policy issued on form used for insurance of buildings.—In an action on a policy of insurance against fire, entered into by the appellants as the insurers, and the respondents as the insured, in respect of a steam vessel, described as plying between Quebec and the Upper Lakes, it appeared that a form of policy had been used which was properly applicable to insurance of houses or buildings; and amongst other conditions on the policy was one, "that if more than twenty pounds weight of gunpowder should be on the premises at the time when any loss happened, such loss should not be made good." The ship was destroyed by fire during the continuance of the policy. It was usual for these steamers to carry gunpowder as freight, and at the time the vessel was destroyed there was 100 pounds weight of gunpowder on board.

Held, that the words "premises" though in popular language applied to buildings, yet, in legal language, meant the subject or thing previously expressed, and that the question being, not what was the intention of the parties, but what is the meaning of the words they have used, the reasonable construction of the contract was that the vessel should not carry more than twenty pounds weight of gunpowder.⁵

255c. Condition of policy as to gunpowder being kept without consent.—The insurance, as expressed on the face of a policy, was upon "the general stock of merchandise, consisting of dry goods, clothing and groceries." By a printed clause of the policy it was provided that it should be void if the assured should keep gunpowder without the written consent of the insurers endorsed

¹ 11 A.R. 743. ² 7 O.R. 643. ³ 8 O.R. 343.

⁴ *Hobbs v. North Am. Ass. Co.*, and see *Mitchell v. City of London Fire Ins. Co.* 12 O.R. 706, and *do. vs. Guardian Fire & Life Ass. Co. of London* 12 S.C.R. 631.

⁵ *Privy Council. Beacon Fire & Life Ins. Co. v. Gibb*, 15 Moore's P. C. Rep. 73.

on the policy. The defence was that the policy had been avoided by a breach of this condition.

The keeping of the gunpowder without the written consent was admitted, but it was contended that keeping gunpowder in stock did not avoid the contract ; first, because it was the custom of the merchants of the class of the assured to keep the same, and, secondly, because gunpowder is embraced in the words used to describe the goods insured, and, being so included, there is a written consent or authority on the face of the policy that it might be kept.

The Supreme Court of Mississippi thus delivered itself upon the proper construction of such policies, after considering the cases brought to their attention : "The language, where ambiguous, is to be construed most favorably for the assured, and where general words of description are used it is competent to show what is included in them in the usual course of business, as what is 'a general stock of merchandise,' or 'such goods as are usually kept in a country store,' or the 'stock in trade of the assured,' etc., etc. Where there is a conflict between the written and printed parts of a policy, the written will prevail, and, therefore, where by a printed clause, the keeping of certain articles is prohibited, but articles are embraced in the fair import of the words used in describing the goods insured, the keeping of such things does not avoid the policy ; but where, by the printed clauses, there is a prohibition as to certain articles, and the written parts of the policy do not embrace the prohibited things, then no usage or custom can be resorted to to add to the terms of the contract an implied permission to deal in the prohibited articles. Where, following general words of description of the property insured, there are words of restrictive enumeration, such as 'consisting of,' 'composed of,' such or such goods, those things which, but for the limited words, would have been included in the general description, but are not included in the restricting words, are excluded. Thus, if in this case the insurance had been upon 'their general stock of merchandise,' the assured might have shown what composed such general stock, and what was understood to be included in it by usage and custom ; and if 'gunpowder' was a part of such stock, then it might have been kept by them, although by a printed condition of the policy it was prohibited. But the written clause of the policy insures not the general stock, but that 'consisting of dry goods, clothing and

groceries,' and these words exclude all things not being 'dry goods, clothing or groceries.' It devolved, therefore, on the assured to prove either that the insurer had waived the condition of this policy, or that gunpowder was 'dry goods, clothing or groceries,' within the fair import of these words as used by the contracting parties, to discover which resort may be had to the usages and customs of trade by which a narrower or broader meaning may be affixed to them. . . . The enquiry in this case should have been whether gunpowder was included in the words used in the policy describing the stock insured."¹

256. Condition that agent be regarded as agent of the applicant.—A clause in the application stating that the agent of the company filling up the application should be regarded as the agent of the applicant is not, by reason of its being made part of the policy, a condition thereof, and subject to the determination of the judge as to whether it is just and reasonable; and if it were it is not unreasonable.²

257. Condition as to non-payment of premium note—Omission to fill up blank date.—A premium note dated the 24th May, 1880, given on effecting an insurance with the defendant's company stated that the insured for value received on policy No. 1,405 dated the 6th May, 1880, promised to pay the company \$14.50 on the 24th of December, 1880, with interest at seven per cent., and contained an agreement that if the note were not paid at maturity, the whole amount of the premium should be considered as earned, and the policy should be null and void so long as the note remained unpaid.

Upon the policy, which was dated the 14th May, 1880, and took effect from the 24th May, 1880, was endorsed a variation condition that the policy should not be valid or binding until the premium was actually paid, unless credit was given for it; and in that case it was a condition of the contract "that if such premium be not paid—18 —, the whole amount of premium shall then be considered as earned, and the policy shall be null and void, so long as any part thereof remains unpaid." The application, which was made a part of the policy, stated that the premium was due on the 24th December, 1880 :—

¹ *Liverpool & London & Globe Ins. Co. v. Van. O. S.* (1886) 63 Miss. 431.

² *Sowden v. Standard Fire Ins. Co.*, 5 A. R. 290. See also *Quinlan v. Union*, 8 A. R. 376, and see *infra* §§ 374 and 455.

Held, that the omission to fill up the blank in the condition, did not prevent its operating, for the condition would be perfect without the figures "18," which might be rejected as surplusage ; but that the condition could be reformed by inserting the words and figures evidently intended—namely, the 24th December, 1880 ; or might have been filled up by the parties :—

Held, also, that the condition was not unreasonable, being in effect the same as that provided for in the case of mutual insurance companies by R.S.O. (1877) c. 161.¹

257a. Condition as to non-payment of premium note—Uniform Conditions Act not applicable to mutual companies.—Under the statutory conditions endorsed on a mutual fire insurance policy the words, prescribed by section 4 of R.S.O. (1887), c. 162, except the heading, "Variations in conditions," were printed in ink of a slightly different colour, but in the same sized type, and after certain conditions varying the statutory conditions, and under the heading, "Additional conditions," there was the following condition in type of the same size and colour. "In case any promissory note for a cash premium or for any premium note * * given to the company, or to any officer or agent thereof, be not paid when due, the policy * * shall be null and void, and the company shall not be liable for any loss occurring either before or after the maturity of such promissory note." The note in this case, payable to defendants' agent or bearer, for \$12, the first payment on the premium undertaking, which was for \$15.62, fell due on the 15th of April, 1878, and the loss exceeding the amount insured \$500, occurred on the 23rd of March. This note was not paid, the plaintiff alleging that he omitted to pay it, assuming that the defendants would deduct it in settling the loss, which had not been adjusted :—

Held, that the Uniform Conditions' Act, R.S.O. (1877),² c. 162 (excepting section 2), does not apply to mutual insurance companies ; but that if it did the condition would have been clearly void for non-compliance with section 4 of that Act :—

Held, also, reversing the judgment of the Queen's Bench, 44 Q. B. 70, that the condition was not just or reasonable, as it was required to be by the express contract, and by section 35 of the Mutual Insurance Act, R.S.O. (1877), c. 161 ; and that the plaintiff

¹ *Sears v. Agricultural Ins. Co.*, 32 C. P. 585.—C. P. D.

² *Supra* § 247.

was entitled to recover. The reasonableness of a condition is to be tested with relation to the circumstances of each case at the time the policy was issued. But *quære* per Moss, C. J. A., whether in the abstract such a condition could be regarded as reasonable, and per Patterson, J. A., it could not. Per Patterson, J. A., the condition was also unreasonable, because more stringent than the statutory provisions upon the same subject, section 48 of the Mutual Act. *Quære*, whether this was a note which the company had power to take, or one within the conditions.¹

258. Condition as to time of payment of loss.—There are several Ontario decisions upon variation of the statutory condition as to time within which loss is payable.²

259. Condition as to alienation of property, transfer, levy, etc.—By a condition in a policy of insurance additional to the statutory conditions, it was provided that “when property insured * * or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein without the consent of this company indorsed hereon, or if the property hereby insured, shall be levied upon, or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding upon the company”.—Held, affirming the decree of Proudfoot, V. C., (26 Chy. 115), that such condition was not just or reasonable, and that it was not binding.³

260. Conditions of policies of English fire insurance companies in Quebec.—The following are in effect the conditions and stipulations adopted by English fire insurance companies in the Province of Quebec, and which according to the policy constitute the basis of the insurance :—

I. *Description of property insured.*—Upon the Insurance of any Property, whether buildings or Goods—in which word *Goods*, as here and hereinafter used, is included Wares and Merchandise,

¹ Ballagh v. Royal Mutual Fire Ins. Co., 5 A. R. 87, referred to *supra* § 247.

² See Smith v. City of London Ins. Co., 14 A. R. 328; 15 S. C. R. 60, p. 971; Peoria Sugar Refining Co. v. Canada F. & M. I. C. 12 A. R. 418, p. 970. See May v. Standard F. I. C., 5 A. R. 605, p. 944; Graham v. Ontario M. I. C., 14 O. R. 358, pp. 954, 959; Reddick v. Saugeen M. I. C., 15 A. R. 363, p. 955; Peck v. Agricultural Ins. Co., 19 O. R. 494, p. 950.

³ Sands v. Standard Ins. Co., 27 Grant Chy. 167.—Chy. D., referred to *supra* § 249a and 363.

Furniture and other movable effects—deposited therein, the party or parties making the same shall specify of what materials the Walls and Roofs of such Buildings are respectively constructed, where situated, and by whom occupied; and whether as private Dwellings or how otherwise; whether any manufacture or Hazardous Trade be carried on, or any Hazardous Articles be deposited or kept therein, and if so, shall describe the nature and qualities thereof; whether any Steam Engine, Furnace, Kiln, Stove, Coakle, or other Apparatus whereby heat is produced (common Fire Places, Stoves and Ovens for domestic use excepted) be erected on the Premises, and if so, shall give a particular description of the nature and construction thereof respectively; and if such specification do not truly and circumstantially describe the Property, and the several particulars regarding the same as aforesaid, so that the nature and degree of the risk may be justly estimated, the Policy and Insurance thereon shall be null and void. The Insurance on any Buildings shall not be held to include anything outside thereof, such as Clapboarding, Blinds, Galleries, Porches, *appentis*, Sheds and other Buildings, except the same be specially mentioned, and valued in the Policy; no Furniture usually denominated Fixtures, Machinery or other *legal* or *constructive immovables*, or Shop, or Store Fixtures and Furniture, contained in any Building, shall be held to be Insured, as appertaining or belonging thereto, except such fixtures shall be specially named in the body of the Policy.

II. *Change in risk to be notified.*—In case any alteration or addition be made in or to any Insured Building or other Property (whether such alteration or addition do consist in the erection of Apparatus for Producing Heat, or the introduction of Articles more hazardous than may be allowed in the Policy, or in a change in the nature of the Occupation, or in any other change whatsoever, by which the degree of Risk is increased, and a consequent additional Premium would be required), and the Insured shall not have given notice thereof respectively to the said Company or its Agents, in writing, and unless such alteration or addition be allowed by endorsement on this Policy, and such increased Premium paid as may be required, such Policy and Insurance shall be null and void.

III. *Ownership of property.*—This Policy will cover only such of the Property described in it as shall be proved to have been at

the time of the alleged loss or damage by fire, the Property, *bona fide*, of the Insured ; unless it shall be specially described as being, by the Insured, held "in trust," or "on commission," in which case the name of the party for whom, and the purpose for which, it is so held in trust or on commission, must be specified in the description.

IV. *Prepayment of premium.*—No Insurance shall be conclusive or binding on this Company unless the Premium be previously paid thereon ; and persons desirous of continuing Annual or other Periodical Assurances must pay their respective Premiums thereon on or before the commencement of each succeeding year, or other periodical Term, otherwise such Insurance will expire ; and the only evidence of such Payments shall be the Printed Receipts issued from the Office, and witnessed by one of the Clerks or Agents of the Company.

V. *Process involving application of fire heat.*—This Company will not be answerable for any Loss or Damage to Stock or Goods, or other Property, whilst undergoing any process in which the application of Fire Heat is necessary.

VI. *What policy does not cover.*—Books of Accounts, written Securities, Money, Bank or Government Notes, and Gunpowder, or other explosive substance, will not be Insured or comprehended in any Insurance effected by or with this Company ; nor will any Loss or Damage in any case or of any description be made good where more than twenty-five pounds weight of Gunpowder or other explosive substance shall be deposited or kept on the premises, unless the same be specially allowed in the body of the Policy ; but this Company will make good Losses on Property burnt by Lightning, except on Buildings having Spires or Steeples without metal Conductors, provided it is not otherwise agreed upon in the body of the Policy.

VII. *What property must be particularly specified.*—Watches, Trinkets, Jewels, Pearls, Plate, Musical Instruments, Pictures, Prints and Drawings, Medals, Coins, Sculpture, or other Curiosities, will not be included in any Insurance effected by this Company, or be covered thereby, unless the same be particularly specified in the Policy ; nor shall any Picture, Print or Drawing, even though mentioned as Insured in this Policy, be covered for more than Forty Dollars, unless a specific amount be named thereon.

VIII. *Other insurance—Option to cancel.*—Notice in writing,

of any other Insurance already, or to be, effected with any other Insurance Company or Companies, on the within Insured Property, or any part of it, shall be given to this Company, who shall then have the right either to endorse hereon a memorandum of such other Insurance, or forthwith to return the Premium for the unexpired term, and cancel this Policy. If this Company endorse such other Insurance hereon, then this Company shall only contribute rateably with the other Company or Companies in making good the Loss or Damage sustained by the Insured. The want of notice, in writing, by the Insured to this Company of any other Insurance on the within Insured Property, or on any part of it, shall, *ipso facto*, render the Policy void; in case of the Insured holding any other Policy on Property in the Premises within described subject to average, then this Policy is declared to be subject to average in like manner. And, further, should the Risk be increased by the erection of buildings, or by the use or occupation of neighbouring premises or otherwise, or if for any other cause the Company shall so elect, it shall be optional with the Company to cancel this Policy, after notice given to the Insured, or his representative, of their intention so to do; in which case the Company will refund the Premium for the unexpired time.

IX. *Death or insolvency of the insured—Removal—Transfer of interest of policy.*—At the death or at the insolvency (under an *Insolvency Act*) of the Insured, and on returning to his legal representative or assignee the Premium for the unexpired term, it shall be competent to this Company, either to cancel this Policy, or, by endorsement, to continue it in force. The Insured removing his Insured goods, or other movable effects, may retain the benefit of this Policy on the same, if the Risk be not increased, and the removal be confirmed by the Company's endorsement hereon. The interest of this Policy may be transferred by Endorsement, made with the written consent of the Company;—but not otherwise.

X. *Notice and proofs of loss—Profit not insured—Fraudulent claims.*—On the happening of any Loss or Damage by Fire, the Insured shall forthwith give notice thereof, in writing, to this Company, or at the Office of the Company's Local Agent through whom the Insurance was effected; and the Insured shall also, within fifteen days at the latest after the fire, deliver to this Company, or its Agent, as accurate and particular an account of

his Loss and Damage, respectively, supported by vouchers, and, in the case of buildings and machinery, by certificates, on oath, of practical architects or builders and mechanics, as the nature and circumstances of the case will admit of, and shall verify the same by solemn oath or affirmation before a Justice of the Peace or Commissioner for taking Affidavits, and shall produce such other evidence as the Company may reasonably require; and unless such particular account and such vouchers, certificates and other evidence shall be produced within the specified time, the amount of the Loss or Damage, or any part thereof, shall not be payable or recoverable. No profit of any kind shall be included in the Claim of the Insured; and, if there appear to be any fraud, over-charge, imposition, or false-swearing, or if it appear that the fire happened by procurement or wilful act, means or connivance of the Insured, or of the person or party claiming under him, or of his Representative, he, or such other person or party, shall, *ipso facto*, be excluded from all benefit under this Policy. In the event of partial Loss or Damage, the Insured shall, by separating the damaged from the undamaged, and otherwise, assort and arrange in as good order as the circumstances of the case will admit of, the undestroyed part of the Insured stock, and goods, so as to facilitate the taking of an account, and the estimating the value of the same.

XI. *Loss payable within sixty days after adjustment—Reinstatement—Abandonment—Overvaluation.*—On due proof being made by the Insured of any Loss or Damage by Fire, and on the adjustment of account thereof, and the acceptance and approval of the same by the Directors of this Company, the amount of the Loss or Damage shall be paid within sixty days after such adjustment, acceptance and approval; or when the Insurance is on goods, this Company may, at its option, replace such of them as were destroyed and damaged, by an equal quantity of like kind, quality and value; and when the Insurance is on a house or other building, or on a steam or other engine, or on machinery, this Company may, at its option, with all convenient speed, rebuild or replace, or repair, reinstate or restore and put the same into as good and substantial a condition as they were when the fire happened. The insured shall not be permitted, either at the time of the fire or afterward, to abandon any of the Insured movable property, without the consent of the Company. If, in his application for the Insurance

effected by this Policy, the Insured shall have overstated the value of the property Insured, he shall, in case of Loss or Damage by Fire, be only entitled to Claim for such proportion of the actual Loss or Damage as the sum of money Insured bears to the value stated in the application. But if the overstatement shall have been made fraudulently, or with a fraudulent intention, then all benefit to the Insured under this Policy shall, *ipso facto*, be, and be held to be, forfeited.

XII. *Removal of property in case of conflagration*.—*Property lost or stolen*.—In case of the necessary removal of the Insured property, to save it from conflagration, this Company will contribute rateably with the Insured, and, if there be other Insurances, with the other Companies whose Insurances may be hereon endorsed, to the Loss and Expenses attending such Act of Salvage, but this Company shall not be held liable for any Loss or Damage of or to property removed from any building (not actually on fire), either *contrary* to the order or direction, or *without* the order or sanction, of the Officer or Agent of this Company, who may be present at the fire, and in a situation to be consulted by the Insured; nor shall this Company be liable for any goods or other movable effects that may be lost or stolen either at, during, or after the fire.

XIII. *Condition as to chimneys, etc.*.—The Company will not be answerable for any Loss where Fires are used in Buildings unprovided with good and substantial Brick or Stone Chimneys, or in consequence of Stoves or Stove Pipes placed or used contrary to law, or in consequence of the infringement of any law in force for the suppression or prevention of Fires, or where Stove Pipes are carried through the exterior walls or roofs of any House or Building; or for any Loss by Fire in any Building under construction or repair; or movables therein, wherein Carpenters and Joiners are employed, unless the special consent of the Company be first obtained and endorsed on the Policy.

XIV. *Officers or agents not personally responsible*.—The Manager or Agents of the Company shall in no case be made personally responsible on account of any Legal or other Investigation, which they may find it necessary to institute for the satisfaction of the Company, nor shall their personal Property be attached on account of any alleged Loss by the Insured. If the Insured should commence such proceedings against the Manager or Agent, it is hereby declared and stipulated that the said Insured shall forfeit thereby

all claim upon the Company for Loss or Damage sustained, and shall, moreover, be responsible for all expenses which shall accrue in consequence of his proceedings.

XV. *Action against the company to be commenced within twelve months after loss.*—It is furthermore hereby expressly provided that no suit or action of any kind against the said Company, for the recovery of any claim upon, under, or by virtue of this Policy, shall be sustainable in any Court of Law or Chancery, unless such suit or action be commenced within the term of twelve months next after the Loss or Damage shall occur; and in case any suit or action shall be commenced against the said Company, after the expiration of twelve months next after such Loss or Damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim so attempted to be enforced.

XVI. *Arbitration.*—If any difference or dispute should arise between the Insured and this Company, touching any Loss or Damage by Fire, such difference or dispute shall not, unless this Company require it, be made a subject of litigation, but shall be settled by a reference of the matter or matters in dispute to the judgment and determination of two disinterested Arbitrators, one to be chosen by each party, and the written award of such Arbitrators, or of an Umpire to be chosen by them, either before or after they shall have commenced their Investigation, shall be conclusive and binding upon both parties, any legal decision, or any law or usage, to the contrary notwithstanding. The expenses of every such Arbitration shall be borne equally by the Insured and this Company.

XVII. *Notices by insured to be in writing.*—No Notice required by any of the above conditions, to be given by the Insured to the Company shall be deemed sufficient, unless it be given in writing, signed by the Insured or the lawful Agent or Representative of the Insured, and delivered to the Manager or other authorized Agent of the Company.

XVIII. *Endorsements to be duly approved.*—No transfer, alteration or endorsement of or upon this Policy, by or on the part of the Insured shall have any force or effect whatever, unless and until it has been duly approved by the Directors, or the Manager or the Local Agent of this Company, and recorded in the Head Office at Montreal; but if the approval be by the Local Agent, the Directors shall have the right of disallowing it.

XIX. Reports of company's officers or agents upon losses to be confidential.—The Reports of the Company's Inspectors, or other Officers or Agents, to the Directors or Manager, in relation to any alleged or actual Loss or Damage by Fire, shall, in every case, be, and be held to be, strictly confidential.

XX. Waiver of conditions.—No one of the above Conditions, either in whole or in part, shall ever be deemed to have been waived, by or on the part of the Company, unless the waiver be clearly expressed in writing, signed by the Company's Manager, and delivered to the Insured or to the lawful Agent or Representative of the Insured.

260a. Conditions of fire insurance policies in use in Great Britain.—

1. *Material mis-description.*—Any material mis-description of any of the property expressed to be hereby insured, or of any building or place in which any such property is contained, or any mis-representation as to, or omission to state, any fact material to be known for estimating the risk, renders this policy void as to the property affected by such mis-description, mis-representation or omission, and any mis-statement in answer to questions put by or on behalf of the company on the proposal for the insurance renders this policy void.

2. *Subsequent increase of risk—Removal.*—If, after the risk has been undertaken by the company, anything whereby the risk is increased be done to, in, or upon, any of the property hereby insured, or to, in, or upon, any building or place in which property hereby insured be removed from such building or place without, in each and every of such cases, the assent or sanction of the company, signified by endorsement hereon, the insurance as to the property affected ceases to attach.

3. *What the policy does not cover.*—This policy does not cover unless the same be specially mentioned in the policy. (a) Goods held in trust or on commission. (b) China, glass, looking glasses, jewels, clocks, watches, trinkets, medals, curiosities, manuscripts, government stamps, engravings, prints, paintings, drawings, tapestries, sculptures, musical, mathematical or philosophical instruments. (c) Patterns, models, moulds, designs. (d) Gunpowder or other explosives.

(e) Deeds, bonds, bills of exchange, promissory notes,

cheques, money, securities for money, documents of title to goods, contracts, or other documents, books of account ;

(f) Loss or damage to property occasioned by or happening through its own spontaneous fermentation or heating ;

(g) Loss or damage occasioned by or happening through earthquakes, invasion, foreign enemy, riot, civil commotion, or military or usurped power ; nor

(h) Loss or damage by explosion.

But loss or damage to property occasioned by explosion of coal gas elsewhere than on premises being part of any gas works, or the property struck by lightning, will be deemed to be loss by fire under the conditions of this policy.

(4.) *Premium receipts.*—No receipts for any premium of insurance shall be valid or available for any purpose whatever, except such as are on printed forms issued from the company's office and signed by one of the clerks or agents of the company.

5. *Alienation of property.*—This policy ceases to be in force as to any of the property hereby insured, which shall pass from the insured to any other person, otherwise than by will or operation of law, unless notice thereof be given to the company and the subsistence of the insurance in favor of such other person be declared by a memorandum endorsed hereon by or on behalf of the company.

(5.) *Notice and proofs of loss.*—On the happening of any loss or damage by fire to any of the property hereby insured, the insured shall forthwith give notice in writing thereof to the company and within fifteen days after the loss or damage, or such further time as the company may allow in that behalf, and at his own expense, deliver to the company a claim in writing for such loss or damage containing as particular an account as may be reasonably practicable of the several articles or items of property damaged or destroyed, stating the amount of the damage to each, and value of each at the time of the loss or damage, and shall also if required, deliver an account, with particulars and values of all other property (if any) hereby insured, and shall produce and give all such books of account, vouchers, invoices (whether originals or copies), plans, specifications, proofs, and explanations as may reasonably be required, together with the particulars of any other insurance or insurances effected by him, or on his behalf on any property insured by or in any way referred to in this policy, and if required, a

statutory declaration of the truth of such accounts ; and no claim whatever under this policy shall be payable, unless the terms of this condition have been complied with.

7. *Fraudulent claims.*—If the claim be in any respect fraudulent, or false book account, entry, voucher, invoice, deed, or other document, plan, specification, estimate, proof, or explanation be produced or given, or if any fraudulent means or devices be used by the insured or any one acting on his behalf to obtain any benefit under this policy, or if any loss or damage by fire be occasioned by the wilful act, or with the connivance, of the insured, all benefit under this policy is forfeited.

8. *Reinstatement.*—The company may, if it think fit, replace or reinstate, wholly or in part, property damaged or destroyed, or any items thereof instead of paying the amount of the loss or damage thereto, and may join with any other company or insurers in so doing in cases where the property is also insured elsewhere. In case the company elect to do so, the insured at his own expense shall supply or produce, as and when required all plans, specifications, measurements, documents, books and information (oral and documentary), which may be requisite for the purpose.

9. *Rights of company in case of fire.—Abandonment.*—On the happening of any loss or damage by fire to any property in respect of which claim is, or may be made under this policy, the company may by its authorized representatives, officers and servants, and shall be allowed by the insured to enter into the building or place in which such loss or damage has happened and for a reasonable time remain in possession thereof and of any property hereby insured which is contained therein, and remove and deal therewith for all reasonable purposes relating to, or in connection with this insurance or the claim thereunder, but the insured shall not in any case have any right to abandon any property to the company, whether taken possession of by the company or not. If the insured or any one acting on his behalf, shall hinder or obstruct the company in doing any of the above acts, then all benefits under this policy shall be forfeited.

10. *Other insurances.*—If, at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, effected by the insured or by any other person or persons on his behalf, covering the same property, this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage.

11. *Subject to average.*—In all cases where any other subsisting insurance or insurances effected by the insured, or by any other person or persons on his behalf, covering any property hereby insured, either exclusively or together with any other property in and subject to the same risk only, shall be subject to average, the insurance on such property under this policy shall be subject to average in like manner.

12. *Arbitration.*—If any difference shall at any time arise between the company and the insured or any claimant under this policy as to the liability or the amount or the extent of the liability of the company in respect of any claim for loss or damage by fire, or as to any question, matter or thing, concerning or arising out of any claim for loss or damage under this policy, every such difference, as and when the same arises, shall be referred to the arbitration of some person to be appointed in writing by both parties, or of two indifferent persons, one to be appointed in writing by the party claiming and the other by the company, within one calendar month after either party has been required so to do by the other party, and in case of disagreement between the arbitrators, then to the decision of an umpire, who shall have been appointed in writing by the arbitrators before entering on the reference and who shall sit with the arbitrators, and preside at the meetings during the reference, unless the arbitrators shall otherwise agree in writing, and the death of any of the parties shall not revoke or affect the authority or powers of any arbitrator or umpire, and each party shall bear or pay his own costs of the reference and a moiety of the costs of the award, and in all other respects the submission to arbitration shall be subject to the provisions of the Arbitration Act, 1889, or any statutory modification thereof, and may be made a rule of Her Majesty's High Court of Justice in any division, upon the application of either of the parties. And it is hereby expressly declared to be a condition precedent to the liability of the company in respect of any claim under this policy, that the claim shall, if not admitted, be referred to and determined by such arbitrator, arbitrators, or umpire as aforesaid, and the claimant shall have no right of action against the company except for the amount of the claim, if admitted, or the amount, if any, awarded by the award of such arbitrator, arbitrators, or umpire.

13. *If policy is void, premiums paid are forfeited.*—In all cases

where this policy is void, or has ceased to be in force or to attach under any of the foregoing conditions, all monies paid to the company in respect thereof shall be forfeited.

14. *What may be done in case of redress.*—The insured and any claimant under this policy shall, at the expense of the company, do, and concur in doing, and permit to be done, all such acts and things as may be necessary or reasonably required by the company for the purpose of enforcing any rights and remedies, or of obtaining relief or indemnity from other parties, to which the company shall be, or would become, entitled or subrogated, upon their paying for, or making good any loss or damage under this policy, whether such acts and things shall be or become necessary or required before or after his indemnification by the company.

261. Conditions of life assurance policies.—In life assurance policies it is generally stated that the policy and the application together constitute the entire contract and that the provisions and stipulations printed at the back thereof are a part of the contract as fully as if recited in the body of the policy over the signatures thereto affixed. No provision can be varied or waived except in writing by one of the executive officers of the company.¹

261a. A recent condition as to change of beneficiary of a life assurance policy.—A condition recently introduced in Canada for the purpose of giving a greater flexibility to life assurance policies is to the effect that the policy may be drawn in favor of the wife or daughter, or any other beneficiary with the express understanding that the assured may change the beneficiary, or beneficiaries, at any time during the continuance of the policy, provided it has not been assigned, by filing with the company a written request duly acknowledged, accompanied by the policy; such change to take effect upon the endorsement of the same on the policy by the company.

Such a condition may be applicable in its entirety to policies in the United States, but it would certainly conflict with some provisions of Canadian law as regards policies taken out in favor of the wife.

262. Conditions of policies of burglary guarantee insurance.—Losses incurred from burglary within the meaning of the Criminal Code, 1892, may be covered by insurance; the conditions upon which such policies are granted in Canada are as follows :

¹ For effect of this clause see *Venner v. Sun Life Ins. Co.*, *supra* § 252b.

1. *Correct representations—Fraudulent claims.*—If the proposal or declaration of the insured is untrue in any respect or if any material fact affecting the risk be incorrectly stated therein or omitted therefrom, or if this insurance or any renewal thereof shall be obtained through any misstatement, misrepresentation or suppression of fact, or if any claim made shall be fraudulent or exaggerated or any false statement or declaration shall be made in support thereof, or if upon any loss or damage happening in respect of which a claim is or may be made under this policy, the insured shall cause or suffer the company or any of its representatives to be hindered or obstructed in entering the premises where the same has occurred or examining any books, vouchers, correspondence or other documents relating or that may relate to the property alleged to be lost or damaged then and in any of these cases this policy shall be void.

2. *Nature of interest of insured—Alienation of property.*—In the case of insurance of contents of dwelling houses property belonging to the wife, husband or children of the insured shall be held as covered by this Policy, but in all other cases the nature of the interests of the insured must be stated to the Company in writing when the insurance is proposed, otherwise it shall be assumed that his interest is that of absolute owner and no other interest shall be deemed to be covered. This insurance shall remain in force as regards the respective subject matters of insurance only so long as the interest of the insured or any person claiming by, from or through him by will or operation of law in such subject matters of insurance respectively, shall continue and any sale, transfer, assignment, hypothecation or pledge of the property covered by the present Policy during the continuance of the said Policy without the previous consent of the Company in writing having been obtained shall render this Policy null and void.

3. *Notice and proof of loss.*—Immediately upon the occurrence of any loss or damage supposed to have been occasioned by risks covered by this Policy, the insured shall give notice thereof in writing to the Company, and shall within fourteen days from the date of the occurrence of such loss or damage give to the Company the best account and particulars in his power, of the circumstances of the loss and damage together with a full description of the property lost or damaged and every part thereof and a specification of the value of the same, and shall furnish all such explanations, vouchers, proofs of ownership and other evidence as may be rea-

sonably required to substantiate the claim, and shall make and cause to be made statutory declarations of the truth of the claim and of the matters aforesaid, and no claim shall be payable under this Policy unless the terms of this condition have been complied with.

4. *Due precautions for the safety of the property—Non-occupation of premises.*—The insured shall take all due precautions for the safety of the property insured as if the same were not insured and shall provide all doors and windows with proper locks and shall see to the proper fastening and locking of the same, and the insured shall not do or suffer anything whereby the risk of the Company shall be increased, provided that should the premises in which the property insured is situated be left unoccupied by day or night for a period exceeding seven days without the prior consent in writing of the Company, and the payment of an additional premium the Policy shall notwithstanding anything therein or in these conditions contained to the contrary cease to be in force so far as regards plate, jewellery, ornaments, trinkets, notes and securities, but this Policy shall extend to cover the said articles if placed in the custody of a bank or of the Company, or removed to an occupied house during the temporary non-occupation of the said premises, after such removal has been duly intimated and approved of by the Company.

5. *Reinstatement—Non-committal of steps taken for recovery of property.*—The Company shall be entitled but not bound either alone or in conjunction with other insurers at any time before a claim has actually been paid, instead of settling the same in payment by money to reinstate the loss or damage, but not to an amount in excess of the several amounts insured. They shall also without thereby being held to admit any claim be entitled to take steps for the recovery of any property claimed for or may themselves in their own and in the insured's name, take any such steps and the insured shall be bound to give the Company all information and reasonable assistance in so doing. The insured may also be required as a condition of any settlement to procure to be given to the Company a valid legal title to the property settled for.

6. *Renewals—Cancellation.*—The Company does not undertake to give notice to the insured to renew this insurance, nor will the Company hold the insured covered in the event of the renewal premium not having been paid on the due date thereof whether

notice has been given or not. The Company may, moreover, at any time, discontinue this insurance on any certain date by giving notice in writing to the insured by registered letter addressed to him at the address mentioned in the Policy of their intention to discontinue the same on such date, and in such case the Company shall (subject to the provisions of the Policy and these conditions) satisfy and discharge all claims in respect of loss or damage which may have occurred before such discontinuance and shall return to the insured the amount of premium corresponding to the unexpired time for which premium has been paid. A notice sent by registered letter in pursuance of this condition shall be deemed to be received at the time when it should have been delivered in the ordinary course of Post.

7. *Material change of risk.*—If any change is made in the said premises material to this risk either by increasing the same or diminishing the same, or if any change be made in the nature of the occupation of the said premises the said changes shall at once be notified to the Company, and in default of such notice being given this Policy shall cease.

8. *Actions on policies—Within six months after loss.*—No suit or action on this Policy for the recovery of any insurance shall be sustainable in any court of law or equity until after the full compliance with the foregoing regulations, nor unless commenced within six months next after the happening of the loss or damage in respect of which the claim is made.

263. The New York Standard Fire Policy.—By legislation New York has adopted what is known as the New York Standard Fire Policy for insurance against fires.

New Jersey, Massachusetts, Michigan, Minnesota, New Hampshire, North Dakota, Pennsylvania, Wisconsin, and Wyoming have also legislated to the same purpose.¹

Mr. Richards, in his recent work,² with reference to this Standard Fire Policy, says: "The use of the standard form is made by the statute obligatory in New York upon all fire companies doing business within the state and a penalty is imposed for violating the act, but it is provided that any policy in form inconsistent with the provisions of the act shall nevertheless be binding upon the company issuing the same.

¹ See Appendix to Clements Fire Ins. Digest, 1893.

² Richards on Ins. 134.

It is hardly necessary to remark that the policy is not an absolute agreement to grant indemnity to the insured at all events for the loss occasioned by the casualty insured against, but is made dependent upon the fulfilment on his part of certain provisions of the contract, which are called conditions. If any one of these is violated or unperformed the policy is avoided, and there can be no recovery unless the policy is subsequently confirmed by the insurer. The conditions for the most part are expressed in the contract itself, and to solve their proper meaning, force and effect must be the chief concern in the study of fire insurance law.

An inspection of this policy will show that some of its conditions are precedent to the effectual making of the contract; others presuppose the contract made, but are precedent to a right of action thereon. Others declare events in which all right under the contract is forfeited or otherwise define the obligations of the parties, or restrict the liability of the insurers. Others deal with the mode of settling disputes, and others limit the period for bringing suit. The conditions may also be divided into three classes, those precedent to a valid inception of the contract; those relating to the contract during the pendency of the risk, and those which appertain to the presentation of the claim of the assured and the proofs of his loss."

264. Printed conditions of policy—Alterations and ambiguity.—Where the written portion of the policy is inconsistent with the printed conditions thereof, the latter must give way, because the words superadded in writing are entitled to have greater effect attributed to them than the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning and are necessarily inserted from design and at the time. The printed words may not express the intention of the parties; the written words certainly do, and hence should control.¹

An alteration upon a policy is an act by which its language and meaning are changed. When legitimately made, it is usually effected by means of endorsements thereon, and if made with the consent of the insured will be valid; if made without the consent of the insured, the policy will not be affected thereby. If made by the insured without the consent of the insurer, it will be of no effect.

¹ Griswold 489, and see *infra* § 267 and index on same subject.

If made by a stranger to the contract, it is called a "spoliation," and will not affect the instrument, if the original words can be restored with certainty.¹

As regards "ambiguity" in the policy Griswold says :

Any indistinctness or uncertainty of expression in the written words of an insurance policy will be construed adversely to the underwriter, as they are the immediate language and terms selected by himself for the expression of his meaning and hence, necessarily inserted from design, so when a company has expressed itself in terms requiring interpretation and construction, it cannot complain if any doubt as to the meaning is resolved in favor of the insured.²

265. Levy on property insured.—Where the condition reads that the policy shall cease if the property insured "shall be levied on or taken into possession under any proceeding in law or equity," it has been held that only personal property was in view.³

266. Conditions as to cancellation by notice, etc.—The power to cancel must be exercised before tender of the premium due.⁴ But the notice of cancellation for non-payment of premium or otherwise may be given even after a loss.⁵

Where, however, the right is to cancel a contract within thirty days by causing a notice to that effect to be mailed to the insured, a notice mailed within thirty days, but not reaching the insured by due course of mail till after the fire will not cancel the contract.⁶ There was a conflict of opinion among the judges who took part in this case. There were two judges who dissented from the judgment of the Queen's Bench, and this judgment reversed the unanimous judgment of the Court of Review. So the opinion which prevailed was held by four judges only, while five were in favor of the company, which was held liable.

Where two parties are severally interested, notice to one does not affect the other.

¹ Griswold, 40. ² Griswold, 41, and see *supra* § 253, and *infra* § 267.

³ See 13 L. N. 331.

⁴ Vennor v. Life Assn. of Scotland, 30 L.C.J. 303, Q.B. 1886.

⁵ Bruce v. Gore Dist. Mut. Ins. Co. 20 U.C. (C.P.) 207.

⁶ Tough v. Provincial Ins. Co. 20 L.C.J., Q.B. 168, and see Goodwin v. Lancashire Fire & Life Ins. Co. 18 *Id.*, p. 1, *supra* §§ 108, 113, and see Lesoleil v. Deloro, Dalloz Jur., Genle. Ct. of Cass. 1868, 1, 335, and see *supra* § 106 et seq.

⁷ Guggisberg v. Waterloo Mut. Ins. Co. 24 U.C. (Ch.) 350.

An expression of the company's wish to cancel and a request to return the policy upon which the premium would be remitted is not sufficient. It has been said in the United States that nothing short of notice and actual tender of the *pro rata* premium will do.¹

There must be an unconditional demand for cancellation not a mere expression of desire, and the right in the company to cancel is strictly construed. The notice must be that the policy is cancelled, not *will be*, and the unearned premium must be tendered.²

266a. Same Subject.—In *Emott v. Slater Mut. Fire Ins. Co.*³ the policy provided that after seven days' notice of intention to cancel the insurance should terminate. A notice dated 13th February was deposited on that day in the Post Office, but not until after the office was closed for the day, and this notice was received by the insured on the next day in due course of mail and informed him that his insurance would terminate on the 20th, the loss not having occurred until the 22nd it was held that the notice was sufficient both within the letter and the spirit of the contract. This decision does not seem to be in conformity with the weight of authority which would construe the notice of cancellation strictly.

266b. Immediate cancellation not valid.—A notice by an insurance company to terminate a fire policy, under statutory condition No. 19 of the Ontario Insurance Act (R.S.O. (1887), c. 167, s. 114), should be wholly in writing and should inform the assured that the policy will be terminated at the expiration of the prescribed statutory period after the service of the notice. Where, therefore, a company gave a notice, which was in effect an immediate cancellation, with a return of the unearned premium from the date of the notice:—Held (Galt, C. J., dissenting), that the policy had not been cancelled.⁴

266c. Repayment of unearned premium a condition precedent.—In another case the company insuring the property, sent a circular to this effect to this particular policy-holder with others, to wit: "Sir,—I have to inform you that the Stadacona Insurance Company has ordered me to notify policy-holders to insure else-

¹ Griffey v. N. Y. Central Ins. Co. 100 N. Y. 417, and see *infra* § 266c.

² Grant v. Reliance Mutual Ins. Co. 44 U.C. (Q.B.) 229, May 116.

³ 7 R. J. 562, see *supra* § 106 et seq.

⁴ Bank of Commerce v. British Am. Ass. Co. 18 O. R. 234, and see Caldwell v. Stadacona Fire & Life Ins. Co. 11 S.C.R. 212.

where, as the company has decided to wind up. You will therefore take notice that your policy of insurance is cancelled from this date. Unearned premiums will be returned hereafter." (Signed by the agent of the company.)

Upon receiving it the policy-holder delivered the policy to one who was agent of this company and of others, and instructed him to place the insurance elsewhere ; but it was not done before there was a loss by fire. Upon the policy-holder bringing action on his policy, the company claimed that there had been a cancellation of the policy.

The Supreme Court of Canada, on appeal to it from the Supreme Court of Nova Scotia, held that the cancellation was not completed. The condition was, as to cancellation, in the words of the English case referred to *infra* § 266d. Strong, J., in his opinion said of it : "The condition is a most unreasonable and one-sided stipulation, as it enables one party to a contract to rescind or put an end to it at its pleasure, whilst the other party is not entitled to a like privilege. Moreover, it is grossly unfair in not providing that notice should be given a reasonable time before the cancellation should take effect, so that the assured might have the opportunity of covering himself by another insurance. These considerations alone ought to induce a court to construe so unjust and harsh a condition with more than ordinary strictness. It is, however, doing no violence to the language of the condition itself to hold that the repayment of the unearned proportion of the premium is to be a condition precedent to the exercise of the right of rescission which the company, at its own arbitrary election, is entitled to subject the assured to. The words are in the form of a proviso, which ordinarily imports a condition precedent. And the language thus permitting it, no one could hesitate to adopt a construction which has at least the merit of attributing to the cancellation the character of a rescission by requiring that the insured shall, as nearly as possible, be put in *statu quo*, rather than that of a forfeiture, which it would be, in fact if not in form, if the condition justified a cancellation such as that proposed by the circular, namely, a cancellation taking place at the arbitrary will of the company, without any return of premiums, the insured being bound to rest content with the assurance that 'unearned premiums will be returned hereafter.'"¹

¹ Caldwell v. Stadacona F. & L. Ins. Co. (1883) 11 S. C. R. 212, 238.

286d. An English construction as to right of company to cancel.—In one of the latest English decisions on an appeal from the Court of Barbadoes, by special leave, being below appealable value, because of its general importance to insurance offices, the condition of the policy of fire insurance, in addition to providing against anything being done by which the risk to the property insured would be increased without the assent of the company, in that the effect of such change of risk would be that the insurance thereon should cease to attach, also provided that, "If by reason of such change, or from any other cause whatever, the society or its agents should desire to terminate the insurance effected by the said policy, it shall be lawful for the society or its agent so to do, by notice to the insured, or to the authorized representatives of the insured, and to require the policy to be given up for the purpose of being cancelled : provided that in such case the society shall refund to the insured a ratable proportion for the unexpired time thereof of the premium received for the insurance."¹

The property insured was forty acres of canes growing on the plantation of the insured. There were three fires, which the insured were advised were probably incendiary fires. The representatives of the insured received and showed to the insurer anonymous letters threatening more fires. A few months afterwards the agent of the insurer gave written notice in due form to the insured that, in consequence of these occurrences, the society terminated the policy from that date, in accordance with the clause above quoted, and at the same time tendered the unearned premium. The insured declined to receive the money, or give up the policy. Upon losses occurring after that date this action had been brought.

The Privy Council held that the insurers had, by force of this condition, the option of terminating the policy at will.²

Lord Watson construed the condition as follows : It consists of two branches which differ in their purpose and effect. The object of the first is not to void or terminate the policy, but to prevent its attaching to such portions of the subjects which it is framed to cover as may, by reason of some act done after its date without the consent of the insurers be exposed to increased risk of fire. The object of the second, with which we have to deal in the

¹ See also *supra* § 286c.

² *Sun Fire office v. Hart* (1880) 14 App. Cas. 98.

present case, is to enable the insurers to release themselves from their contracts during its currency, leaving it in full vigor down to the time of notice. The words in which the power of determination is expressed, taken by themselves, are very wide and comprehensive. According to their primary and natural meaning they import that, in order to justify the exercise of the power, nothing is required, except the existence of a desire on the part of the insurer to get rid of future liability, whether such desire be prompted by causes which prevent the policy attaching or by any other cause whatever. That construction of the words, read apart from the preceding context, appears to have been accepted by the majority of the Court of Appeals."

The Chief Justice of Grenada said: "It is impossible for words to be more general, and, if construed literally, any, the most absurd, constructions could be put upon them." It can hardly be suggested that the literal construction of the words would go further than giving the insurers the option of determining the policy at will, and the learned Chief Justice was apparently of opinion that it would go that length. So far their Lordships agree with him, but they are unable to concur in his view that such a construction would, in any aspect of it, be absurd. The condition does not involve the avoidance of the policy *ab initio*, or forfeiture of the premium paid by the insured. There may be many circumstances calculated to beget in the mind of a fair and reasonable insurer, a strong desire to terminate the policy, which it would be inconvenient to state and difficult to prove; and it must not be forgotten that the whole business of insurance offices consists in the issue of policies, and that they have no inducement and are not likely to curtail their business without sufficient cause. On the other hand the insured gets all the protection which he pays for, and, when the policy is determined, can protect his own interests by effecting another insurance.

It is a well-known canon of construction that, where a particular enumeration is followed by such words as "or other," the latter expression ought, if not enlarged by the context, to be limited to matters *ejusdem generis* with those specially enumerated. The canon is attended with no difficulty except in its application. Whether it applies at all, and, if so, what effect should be given to it, must in every case depend upon the precise terms, subject-matter, and context of the clause under construction. In the pre

sent case there appears to their Lordships to be no room for its application. The theory upon which the ruling of the presiding judge and its affirmance by the majority of the Court of Appeal proceeds appears to be this : the words "by reason of such change" are equivalent to an enumeration of certain particular changes or causes specified in the preceding condition ; and that the following words, "or from any cause whatever," must be confined to cause *ejusdem generis* with these.

The antecedent context does not contain a mere specification of particulars, but the description of a complete *genus*, if not of two *genera*. The first of these is, any and every act done to the insured property whereby the risk of fire is increased. Taking that as a particular, none of the learned judges has suggested what circumstances would constitute *alia similia*. Their Lordships are accordingly of opinion that the condition must be read in the literal and natural sense of the language which the contracting parties have chosen to employ, and that it includes any and every cause which could reasonably induce an insurer to desire the termination of the policy.

The question remains whether the clause gives the insurers the right to act upon their own judgment, or whether they are bound, if so required, to allege and prove to the satisfaction of a judge or jury not only that a desire exists on their part, but that they have reasonable grounds for entertaining it. If the determination of the policy would be for the advantage of its business, that would obviously be a reasonable ground for the office desiring to put an end to it, and *a priori* one would suppose that the insurers themselves must be the best if not the only capable judges of what will benefit their business. An insurance office may deem it prudent and resolve to limit its outstanding engagements, and, unless the words of the clause clearly imply the contrary, it cannot be presumed that the parties meant to make such a question of prudent administration the subject of inquiry in a court of law.

These and other considerations, already adverted to, have led their Lordships to the conclusion that the sufficiency of the reasons moving them to desire the termination of the risk which they had undertaken, is a matter of which the insurers are constituted the sole judges."

266e. Notice to broker—Partner's consent—Actual tender of premium unnecessary.—A company having by the terms of its

policy the power and right to terminate the insurance at any time, upon giving notice, cannot effectively cancel a policy by giving notice to a broker who had negotiated the insurance for his client. Such notice must be given to the assured himself, or be communicated to him by the one receiving it to make a sufficient cancellation.¹

Cooley, C. J., said in a Michigan case: "A partner's consent to the cancellation of an insurance policy in which the firm is interested is conclusive on the firm, and a formal surrender of a policy is unimportant, except as evidence of the cancellation. Transactions with reference to the cancellation of an insurance policy are to be construed reasonably and fairly, and in accordance with the evident understanding of the parties at the time. The actual tender of unearned premium is unnecessary to the cancellation of an insurance policy if the minds of the parties have met on the point that the policy is to be cancelled."²

266f. When actual tender of premium is necessary.—But where an insurance policy provides for a cancellation at the option of the insurers, on giving notice to that effect and refunding or tendering a ratable proportion of the premium for the unexpired term of the policy to the insured, there must be an actual tender to the insured, or to his authorized agent, of the full amount of the unearned premium; and a tender of only a part of the premium due, and of another policy of insurance in another company for the balance, has been held not sufficient.³

266g. Cancellation on "request" of assured.—In a well considered case before the New York Court of Appeals, the New York statute regulating the cancellation of fire insurance policies was brought before the court. The statute provides that "any corporation transacting the business of fire insurance in this State shall cancel any policy of insurance hereafter issued or renewed at any time by request of the party insured." (Laws 1880, ch. 110 § 3.)

The policy here considered was returned to the agent issuing it, who was authorized not only to issue policies but to accept them for cancellation and terminate insurances at the request of the

¹ Scott v. Sun Fire Office (1800) 133 Pa. St. 322.

² Hillock v. Traders' Ins. Co. 54 Mich. 531.

³ Quong Tue Sing v. Anglo-Nevada Ass. Corpn. (1890) 86 Cal. 566.

insured. The letter accompanying the policy stated that it was sent for cancellation and requested that it be attended to "at once." Not having formally cancelled it, the agent, after a loss, returned it to the assured, but again it was returned to the agent upon conditions. Whether or not this policy was cancelled, under the facts, was the question before the courts.

They said: "The command of the statute is clear, and no discretion or option is left to the company. The sole requirement to set the command in motion is a request by the insured, and, after that request is made, the further continuance of the contract would be in contravention of the statute. Each of the policies in question contains a provision that the "insurance may be terminated at any time at the request of the assured." While the method of terminating the insurance upon the motion of the assured, is not specified, except that the insured party is to request it, the language of the contract indicates that the subject is within his control, and that the terminating act is to be done by him alone, without any concurrent or supplemental act on the part of the company.¹

¹ *Crown Point Ins. Co. v. Ætna Ins. Co.*, (1891) 127 N. Y. 608.

CHAPTER X.

WARRANTIES, REPRESENTATIONS AND CONCEALMENT, ETC.

267. GENERAL REMARKS ON WARRANTIES, REPRESENTATIONS AND CONCEALMENT—AMBIGUOUS ANSWERS AND UNANSWERED QUESTIONS — VARIOUS DOCTRINES AS TO THE NATURE OF A REPRESENTATION.

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270. TRUTHFUL ANSWERS — GOOD FAITH IS OF THE ESSENCE OF THE CONTRACT — TRUE DESCRIPTION AN IMPLIED WARRANTY — INSURANCE COVERS ALL EFFECTS FALLING WITHIN THE DESCRIPTION — WHERE DESCRIPTION DID NOT IMPLY A WARRANTY—WARRANTY AS TO DECLARATION OF INTEREST PRESUMED RENOUNCED, IF NOT INVOKED BY INSURER.

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274. INCREASE OF RISK—STEAM SAW MILL ON ADJOINING LAND—SUBLETTING — ADDITIONAL INSURANCE—NOTICE TO AGENT AND COMPANY—COTTON DRIED IN A TANNERY—SPOOL FACTORY—MANUFACTURE OF EXCELSIOR.

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283. ENGLISH VIEWS UPON CONCEALMENT — CONCEALMENT BY BROKER — MISREPRESENTATION INNOCENTLY MADE—FREEDOM FROM MISREPRESENTATION A CONDITION PRECEDENT.

284. AMERICAN VIEWS AND DECISIONS UPON CONCEALMENT — CONCEALMENT AS TO DISEASES—UNTRUE ANSWERS MADE IN GOOD FAITH—KNOWLEDGE OF AGENT—CONCEALMENT OF A RELEASE — CONCEALMENT OF FINANCIAL EMBARRASSMENT — FALSE STATEMENT BY AGENT—CALIFORNIA STATUTE AS TO CONCEALMENT—CONCEALMENT OF RUMOR OF VESSEL BEING LOST.

285. VACANCY—NOTICE TO AGENT—KNOWLEDGE OF MANAGER OF COMPANY—LOSS PAID TO LOAN COMPANY — SUBSEQUENT MORTGAGES — ASSIGNMENT OF MORTGAGE.

286. AMERICAN DECISIONS ON VACANCY—NEW HAMPSHIRE RULING—NEBRASKA RULING.

287. STATEMENTS AS TO BELIEF, EXPECTATION OR INTENTION—EXPECTED OCCUPANCY OF A HOUSE—ORAL PROMISSORY REPRESENTATION HONESTLY MADE — DATE OF SAILING — VALIDITY OF PROMISSORY REPRESENTATIONS QUESTIONED — WATCHMAN—ANSWERS TRUE TO THE BEST OF APPLICANT'S KNOWLEDGE AND BELIEF — WILFUL MISREPRESENTATION — ENQUIRIES BY AGENT—CONCEALMENT OF AN ACCIDENT AND OF DISEASE IN FAMILY—MISREPRESENTATIONS MADE KNOWINGLY, NO RETURN OF PREMIUMS PAID—ENGLISH DECISIONS AS TO ANSWERS—TEMPERATE HABITS—PREVIOUS REFUSAL—ANSWERS TRUE TO APPLICANT'S BEST KNOWLEDGE AND BELIEF—QUESTION OF RESIDENCE—ANSWER BY PARTNER OF A FIRM—ANSWER TO A PAROL ENQUIRY.

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287. General remarks on warranties, representations and concealment, ambiguous answers and unanswered questions.—As we have seen,¹ warranties and conditions are a part of the contract and must be true if affirmative, and if promissory must be complied with, otherwise the contract may be annulled, though made in good faith. Warranties may be implied, as well as express.²

These rules express the received and long settled doctrine of the English law. They do not differ from the rules of the French law in the particular of making the clauses and conditions called warranties binding *prima facie* upon the insured, but under the latter system the question of materiality is always admitted, while in the former it is excluded and the insured is bound by the special terms of his agreement, whether they be material or not.³

The Insurance Act of Canada provides⁴ that no life policy shall contain any condition declaring the policy void by reason of any statement in the application being untrue, unless such condition is limited to cases in which such statement is material to

¹ *Supra* Chap. IX.

² *Gibson v. Small*, 4 H. L. C. 353. 3 Kents Comm. 288, 1 Ph. 117, 127, ch. 8, 9. 1 Arn. 625, para. 223, p. 689, ch. 4. 1 Bell Comm. 539, C. C. L. C. 2490, 2491.

³ Report of Commrs. on C. C. L. C. 3 vol. 244.

⁴ R. S. C., cap. 124, sec. 28, and see 60 Vic. c. 36, sec. 144, ss. 2 (O.) *infra* § 268.

the contract. And it has been held by the Supreme Court of Canada¹ that, unless the application for insurance is made part of the policy by insertion or reference, the statements in it are not warranties but mere collateral representations which would not avoid the policy, unless the facts misstated were material to the risk.

And even if the application be considered as forming part of the policy owing to its being connected with it by verbal testimony and if the statements in it are held to be warranties, still, if the insured has only pledged himself to the truth of his answers "so far as known to him and material to the risk," the result is the same, whether they are warranties or collateral representations, and it is a question for the jury as to such knowledge and materiality.²

As a rule when the application is referred to as forming a part of the contract, the statements therein contained are held to have the force of warranties. But courts are indisposed to make a paper by reference a warranty and part of the contract unless clearly obliged to.³

A mere reference to an application or survey in general terms does not make the contents warranties, but only representations. And in Canada, even though the application is made a part of the policy, a misstatement or wrong answer will not in the absence of an express warranty avoid the policy, unless it is material.⁴

Insurance companies seem sometimes by indulging in over-caution, leading to the use of unnecessary stipulations regarding warranties, to defeat their own object.⁵

Where the insured declared that he answered to the best of his knowledge and belief and omitted to state an accident from the results of which he was in bed five weeks, it is for the jury to say whether he wilfully withheld the facts or forgot them or honestly thought them of too little consequence to be mentioned.⁶

If there is the slightest room for doubt the courts will hold a stipulation a representation rather than a warranty.⁷

¹ North British etc. v. McLennan, 21 S. C. R., 289, reported *infra* § 282. ² *Id.*

³ Phoenix Ins. Co. v. Benton, 87 Ind. 132, May 159 n. 3.

⁴ Goring v. London Mut. Fire Ins. Co., 10 Ont. R. 234, 245, 246, reported *infra* § 282, and see Wilson v. Standard Ins. Co., U.C.C.P., 15 Can. L. J. n. s. 32, Fowkes v. Manchester and London L. Ass., 3 B. & S. (Q. B.) 917.

⁵ Continental Life Ins. Co. v. Rogers 119 Ill. 474, and see cases in May 161, notes 3 and 4. ⁶ Miller v. Confed. Life Ass. Co., 14 S. C. R. 330.

⁷ Worswick v. Canada etc. Ins. Co. Ct. of App. Ontario, 9 Ins. L. J. 299. May 162 n. 2.

If the company accepts an indefinite or insufficient answer it will be construed liberally in favor of the insured, as when a question as to how the premises are occupied is answered "dwelling etc," this will be held as notice that a saloon is kept there.¹ The construction is always *contra proferentes* and the policy is prepared by the company.²

Where there is a discrepancy or conflict between printed and written matter in a contract the written portion prevails.³

The tendency of judicial decisions in England, Canada and the United States is to pay more regard to the policy and less to evidence of custom. The reason of this is that policies, especially fire and life, are drawn with more care and skill than formerly and have been corrected in accordance with decisions and made more distinct and precise with the growth of actuarial experience.⁴ Fire and life policies are drawn as legal and not mercantile documents, and there are not many cases in which they can be construed with reference to mercantile custom.⁵

In the recent Ontario case of *Manufac. Life Ins. Co. and Gordon*,⁶ however, Burton, J. A., recalled Lord Blackburn's dictum to the following effect: "Show this contract to the first hundred business men you meet with on the street, and I do not doubt but that each of them will place the same construction upon it," adding that he was free to admit that that construction was much more likely to be correct than that of himself, who knew nothing of the business, or that of a whole bench of judges, quoting from memory the substance of what was said. But Lord Westbury in the case of *Thompson v. Hudson*, L. R. 4, H. L. I., used language almost as treasonable; and Lord Bramwell comments in a similar way upon the incongruity of referring to him who was neither a fishmonger nor a carrier, nor with any knowledge of their business, to say whether a contract made by a fishmonger and a carrier of fish, who

¹ *Gouinlock v. Manufac. & Merc. Mut. Fire Ins. Co.* 43 U. C. (Q.B.) 563. *Rowe v. London etc. Ins. Co.* 12 U. C. (Ch.) 311. *Davis v. Scottish Prov. Ins. Co.* 16 U. C. (C.P.) 176.

² *Life Assn. of Scot'd. v. Foster* 11 C. S. C. (3rd series) 351, 371. *Birrell v. Dryer* 9 App. Cass, 345. *Notman v. Anchor Co.* 4 C. B. N. S. 476. *Tilton v. Accidental Death* 17 C. B. N. S., 122. *Smith v. Accidental etc. Co.* 22 L. T. N. S., 861. See also *supra* §§ 253, 264, and see index on same subject.

³ *Robertson v. French* 4 East, 130, 135 Lord Ellenborough and see *supra* § 264.

⁴ See *Pearson v. Coml. Union* 1 A. C. 510 O'Hagan.

⁵ *North British & Mercantile v. Liverpool & London & Globe* 46 L. J. Ch. 537, do v. *Moffat* L. R. 7 C. P. 25, *Porters' Laws of Ins.* p. 31.

⁶ Referred to at length *supra* § 78.

knew their business, was just and reasonable. It is well, however, to point out that one occasionally finds policies which are open to the objections suggested by the judges in the course of the argument in Pritchard's case, and that parties may possibly, in such cases, be left to the mercy or the sense of justice of the assurance company.

The point as to whether in an action brought on a policy and where the question is whether facts withheld were material, persons conversant with the business of insurance can be asked their opinions on the subject, is discussed by Judge Mackay.¹

The insured is bound to a full representation of all facts showing the nature and extent of the risk and which may affect the rate of premium or prevent the contract being made at all.² He is not bound to represent such facts as are known to the insurer or which the latter is presumed to know owing to their public character. Nor is he obliged to declare facts covered by warranty express or implied except in answer to enquiries made by the insured.³

Misrepresentation or concealment either by error or design of a fact of a nature to diminish the appreciation of the risk or change the object of it is a cause of nullity even though the loss be not caused by the fact misrepresented or concealed.⁴

Although fraudulent misrepresentation or concealment on the part either of the insurer or of the insured is in all cases a cause of nullity, the obligation of the insured with respect to representation is satisfied when the fact is substantially as represented and there is no material concealment.⁵ These rules are common to the law of insurance in all countries, although less rigor has prevailed in France than in England, Canada and the United States in their construction and enforcement.⁶

When a party applies to an agent of a fire insurance company and secures insurance through him in the ordinary mode and after the usual enquiries the fact that such party does not mention that he had previously applied to another agent of the same company

¹ 13 L. N. 371. ² See *supra* § 53.

³ 2 Pardessus n. 593, para. 5. C. 2486, 2497. 3 Kents Comm. 285, 286, 1 Ph. 88, 89. C.C.L.C. 2485 and *infra* § 268. ⁴ *Infra*, § 268.

⁵ 1 Poth. Ass. c. 3, a. 3, 194-199; 1 Alauzet 202, p. 371, and 2 *Ib.* 414; Marsh 452, 453, 479; 3 Kents Com. 233; 1 Ph. 80, 81, 108; 1 Arn. 544, n. 191; Casey & Goldsmith, 2 L.C.R. 202, 4 *Ib.* 107, 1 Bell Com. 532, C.C.L.C. 2488, 2490.

⁶ Report of Comrs. on C.C.L.C. vol. 3, p. 242.

and been refused is not the concealment of a material fact to render the insurance void.¹

With regard to the statements of third persons it seems to be the settled law of England that when the insured does not expressly stipulate for the truth of the statements of third persons, but only states his belief in their truth, fraudulent misrepresentations or concealment by them, but not known to the insured, will not avoid the policy.²

“An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which the validity of the entire contract depends.” This is the definition given by Arnould,³ which formerly met with general acceptance.

It is clear that a stipulation made a part of the policy by reference may also be a warranty, and it is said that by a warranty the insured stipulates for the absolute truth of the statement made and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled. In this view a warranty is an agreement in the nature of a condition precedent, and like that must be strictly complied with; while a representation is collateral or preliminary to the contract, and though false does not avoid the contract unless actually material or clearly intended to be made material by the parties.

It has been said that whether the fact stated or the act stipulated for as warranty be material to the risk or not is of no consequence, the contract being that the matter is as represented, or shall be as promised; and unless it proves so, whether from fraud, mistake, negligence or other cause, not proceeding from the insured, or the intervention of the law, or the act of God, the insured can have no claim.

It has also been said that one of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement; the only question being: has the warranty been kept.⁴ The special legislation above referred to must, however, be considered as modifying this doctrine, and even under

¹ Goodwin v. Lancashire Co. 18 L.C.J. (Q.B.) 1, referred to *supra* § 266, and see *infra* § 279a.

² Wheelton v. Hardisty, Q.B. affirmed in Ex. Ch. 8 El. & Bl. 232, and see *infra* § 287b.

³ 577.

⁴ May, 156, and see Scott v. Quebec Fire Ins. Co. 2 R. de L. 125, and see Privy Council Grant v. Aetna Ins. Co. 15 Moores P.C. Rep. 516, *infra* § 273.

the common law there are authorities to the effect that in dealing with warranties common sense is not to be lost sight of; that the fair practical intent of the parties is to be sought and that substantial fulfilment of a warranty is enough.

It would certainly seem subversive of the true intent of the contract to avoid it because of any trivial misrepresentation not material to either party.¹

It has been declared by the Supreme Court of Canada that where payment of an insurance risk is resisted on the ground of misrepresentation it ought to be made very clear that such misrepresentation was made; that misrepresentation, made with intent to deceive, vitiates a policy, however trivial or immaterial to the risk it may be; but if honestly made it only vitiates when materially and substantially incorrect.

Representation in a marine policy that the vessel insured was built in 1890 when the fact was that it was an old vessel extensively repaired and given a new name and register, but containing the original engine, boiler and machinery, with some of the old material, was held a misrepresentation, which avoided the policy, whether made with intent to deceive or not.²

In the very recent English case of *Hambrough v. Mutual Life Ins. Co. of New York*,³ the Court of Appeal discussed at some length the effect of the stipulation that the insured's statements were "warranted to be true and are offered to the company as a consideration of the contract." Lopes, L. J., in that case said: "What is the effect of (the clause just cited)? On behalf of the plaintiff it was argued that there ought to have been express words in the contract to the effect that the truth of the statements was to be a condition precedent, if that was intended by the company. Now, I think, this is a very good statement of the law: In policies of insurance on life an erroneous statement respecting the life insured or mere silence respecting a material fact, in the absence of any fraudulent intention, does not avoid the policy,

¹ May, 156, and see *North British & Mercantile Ins. Co. v. McLennan*, 21 S.C.R. 288, referred to *supra* and reported *infra* § 282, and *Scott v. Phoenix Ins. Co.* in P. C.

² Supreme Ct. of Canada (on appeal from Supreme Court of Nova Scotia), *The Nova Scotia Marine Ins. Co. & Stevenson*, 23 S.C.R. 137, and see *Sly v. Ottawa Agricultural Ins. Co.* 29 U.C. C.P. 557; *Greet v. Citizens Ins. Co.* 27 Gr. 121, 5 A.R. 596, reported *infra* § 279d; *Porter's Laws of Ins.* 148, and *Cockburn, C.J.*, in *Macdonald v. Law Union Ins. Co.* L.R. 9 Q.B. at p. 332, reported *infra* § 281b.

³ 72 (English) Law Times Reports 140 (1895.)

unless the policy contains an express proviso that it shall be conditional upon the truth of the declaration made by the insured. In my opinion, the clause in the proposal does contain an express condition. In two cases which have been cited to us, namely, *The Newcastle Fire Insurance Company v. Macmorran* (3 Dow 255) and *Barnard v. Faber* (68 L. T. Rep. 179 ; (1893), 1 Q. B. 340), in the Court of Appeal, it has been held that the word 'warranty' used in a policy of insurance implies a condition precedent. It was sought to distinguish those two cases from the present one on the ground that they were decisions on fire policies, this being a life policy. I cannot see any possible ground for drawing any distinction in the meaning of 'warranty' as used in the two kinds of insurance. But if there were anything in that point, I think that it is enough for this case to hold that the last words of the clause are equivalent to an agreement that the truth of the statements forms the basis of the contract or that they are that on which the contract is to be founded. I agree, therefore, with the construction that has been put upon this clause by the Lord Chief Justice and that the statements which are therein referred to are in fact untrue. I think that this application ought to be dismissed."

Rigby, L. J. : "I agree on both points, both as to the findings of the jury and the ruling of the Lord Chief Justice. Either of the two points is enough to dispose of the case. (His Lordship dealt with the findings of the jury.) As to the other point, the construction of this clause in the proposal, I agree with what has been said by my learned brethren. The deceased warranted that the statements he had made were true in every particular, not merely substantially true, nor true in every material particular, but true in every particular. The statements are offered to the company as a consideration of the contract which the deceased agreed to accept as issued by the company in conformity with the application. The literal truth of the statements being warranted, it was made part of the consideration without which the contract would not have been entered into at all. The mere fact that, as in all these cases, a premium is also to be paid, does not seem to me to affect the question one way or the other."

It may be of interest to note, Arnould and Duer are directly at variance in regard to the nature of a representation and its connection with the contract of insurance. Arnould maintains, and

the other English writers on insurance are of the same opinion, that a representation is collateral to the contract and invalidates the policy only on the ground of fraud upon the insurer. But he holds that the fraud required is not moral, but simply legal fraud. It is sufficient if the insurer is misled, even by an innocent mistake of the other party, this constituting a fraud in contemplation of law.¹

Duer, on the other hand, insists with his accustomed force and clearness that every positive representation is a part of the contract of insurance, though not inserted in the policy; and that its substantial correctness is thereby made a condition precedent on which the validity of the policy depends; that a representation is equivalent to a warranty, except in regard to the strictness of fulfilment required; "that where there is no actual intention to deceive, there is no other fraud than exists in every case where a party relies on a promise that is not fulfilled;" and that, therefore, the effect of an innocent misrepresentation in invalidating a policy cannot be on the ground of fraud, but on account of the non-performance of a condition precedent.²

Phillips' doctrine is that "it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake."³

As we have seen, Art. 2487 C.C.L.C. enacts that concealment either by error or design of any fact of a nature to diminish the assurer's appreciation of the risk is a cause of nullity. No point in the law of insurance is better settled than that, in every case of misrepresentation of existing facts material to the risk, the insurer is not liable for an injury to the property insured, though it has no connection with the fact misrepresented, but is owing entirely to another cause. This is on the ground that the insurer has been misled by the misrepresentation, and would, if the fact had been truly stated, either have declined the risk entirely, or demanded a larger premium. But the applicability of this doctrine to promissory representations has been denied, and it is held that the material increase of the risk by a breach of a representation of that character constitutes in itself no defence for the insurer, but that he must also show that but for its non-fulfilment the loss would not have occurred.⁴

¹ Arnould on Ins. 495.

² Duer on Ins., vol. 2, Lect. 14, p. 653.

³ 1 Phillips, Ins. 287.

⁴ Stebbins v. Globe Ins. Co., 2 Hall 632, and see 13 L.N. 343.

268. Dominion and provincial legislation.—In short, it may be said that it has been found difficult to determine how far strict accuracy is to be exacted from the insured in the statements made by him at the time the insurance is effected. To meet this difficulty special legislation has been enacted by the Dominion Parliament (the constitutionality of which is doubtful)¹ and by the legislatures of Ontario², Quebec,³ Manitoba⁴ and British Columbia.⁵ We shall consider the effect of each of these enactments *seriatim*.

Under the Insurance Act of Canada⁶ no condition, stipulation or proviso modifying or impairing the effect of any policy or certificate of life insurance, issued after the 1 Jan., 1886, by any company doing business within Canada under the authority of the Parliament of Canada, shall be good or valid unless such condition, stipulation or proviso is set out in full on the face or back of the policy. And no policy or certificate shall be avoided by reason of any statement contained in the application therefor being untrue, unless such condition is limited to cases in which such statement is material to the contract.⁷

And⁸ where in any contract of life assurance entered into with any company licensed to carry on business in Canada under the provisions of the Insurance Act of Canada the age of the person whose life is insured is given erroneously in any statement or warranty made for the purposes of the contract, such contract shall not be avoided by reason only of the age being other than as stated or warranted, if it appears that such statement or warranty was made in good faith and without any intention to deceive, but the person entitled to recover on such a contract shall not be entitled to recover more than an amount which bears the same *ratio* to the sum that such person would otherwise be entitled to recover as the premium proper to the stated age of such person bears to the premium proper to the actual age of such person, the stated age and actual age being both taken as to the date of the contract, but in no case shall the amount receivable exceed the amount stated or indicated in the contract. As has been pointed out, the constitutionality of these provisions is doubtful. They seem *ultra vires* of the powers conferred by our constitution on the Dominion Parliament.⁹

¹ R. S. C. c. 124, s. 27, see *supra* §§ 34, 38. ² 60 Vic., c. 36 (O), s. 168, ss. 1 seq.

³ C. C. L. C. 2489. ⁴ R. S. M. 1891, cap. 59, stat. con. 1.

⁵ B. C. Ins. Policy Act 1893, c. 12, stat. con. 1. ⁶ See *supra* note 1.

⁷ For effect of this clause see *Venner v. Sun Life Ins. Co. supra* § 252 b.

⁸ 57 Vic., c. 20 (Can.) ⁹ *Vide supra* §§ 34, 38.

The Ontario Legislature has enacted a statutory condition with regard to fire insurance to the effect that if the insured describe the insured property otherwise than it really is, to the prejudice of the company, or misrepresents or omits any circumstance material to be made known to the company in order to enable it to judge of the risk, such insurance shall be invalid in so far as it affects the property in regard to which the misrepresentation or omission is made. And the policy is deemed to be in accord with the application unless the company points out a difference.¹

It has also been enacted in Ontario ² that all the terms and conditions of the contract must be set out by the company in full on the face or back of the instrument. And the contract must not contain or have endorsed on it or be made subject to any provision providing that such contract shall be avoided by reason of any statement in the application, unless such condition is limited to statements material to the contract, and the statement must be material to avoid the contract. In a recent case,³ Rose, J., commenting on this provision said: "Does this section require the condition to be limited in terms as follows:—*This condition is limited to cases in which such statement is material to the contract.* Or would it be sufficient if the cases to which the condition is made to apply are cases in which the statement is material to the risk. I have come to the conclusion that the insured must have clear and distinct notice in the words of the statute." The question of materiality is in all cases a question of fact for the jury, or for the court if there be no jury. But the application may be considered with the policy and the court determines how far the insurer was induced to make the contract by any material misrepresentation in the application.⁴

As to error in age the Ontario legislature has enacted a provision similar to that of the Dominion Act.⁵

Under the Civil Code of Lower Canada the insured is obliged to represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium.⁶ But representa-

¹ 60 Vic., c. 36 (O) s. 168, ss. 2, and see *Moore v. Citizen's Fire Ins. Co.* 14 A. R. at 587. ² 60 Vic., c. 36 (O) s. 144 ss. 1.

³ *London West v. London Guarantee Co.*, 26 O. R. 526, reported *infra* § 278.

⁴ 60 Vic., c. 36 (O), s. 144, ss. 1. ⁵ 60 Vic. c. 36 (O) s. 149, ss 1.

⁶ C. C. L. C. 2485 & seq.

tions not contained in the policy or made a part of it are not admitted to control its construction or effect.¹

The contract of life insurance is *uberrimae fidei*. The insured is not obliged to represent facts known to the insurer or which from their public character or notoriety he is presumed to know; nor is he obliged to declare facts covered by warranty, express or implied, except in answer to enquiries made by the insurer.²

Misrepresentation or concealment, either by error or design of a fact of a nature to diminish the appreciation of the risk or change the object of it is a cause of nullity.³ The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed. Fraudulent misrepresentation or concealment on the part either of the insurer or of the insured is in all cases a cause of nullity of the contract in favor of the innocent party.

The obligation of the insured with respect to representation is satisfied when the fact is substantially as represented and there is no material concealment.

Warranties and conditions are a part of the contract and must be true if affirmative and if promissory must be complied with; otherwise the contract may be annulled, notwithstanding the good faith of the insured. They are either express or implied. An express warranty is a stipulation or condition expressed in the policy or so referred to in it as to make part of the policy.⁴

As to error of age the Quebec enactment is that the declaration in the policy constitutes a warranty upon the correctness of which the contract depends.⁵ In view of this Quebec enactment the question of the constitutionality of the Dominion enactment⁶ is of importance. It would seem that the Dominion legislation must be held *ultra vires* and that in Quebec error in age is a cause of nullity at present. Relief from this onerous position can be obtained only by the future intervention of the Quebec legislature.

Manitoba and British Columbia have enacted legislation similar to that of the Ontario statutory conditions above referred to.

As we have seen, in cases regarding policies governed by the

¹ C. C. L. C. 2570. ² *Supra* § 267. ³ *Ib.*

⁴ C. C. L. C. 2486 et seq. and see *supra* § 267.

⁵ C. C. L. C. 2588 and see *Hartigan v. International Life Ass. Co.* 8 L. C. J., 203.

⁶ See *supra*.

statutory conditions the distinction between warranties and representations so much discussed ceases to have much practical significance. Whether warranty or representation it does not forfeit the contract unless material.

269. Description of property and premises—Grocery—Sale of liquor by retail.—The plaintiff describing himself in the application as a grocer and his store as being used as a grocery insured with defendants his stock of groceries, etc., therein and without the knowledge or assent of the defendants habitually retailed liquor there, but the jury found that the risk was not thereby increased.

It was decided no misrepresentation or concealment of a material fact; that in insuring a grocery defendants knew that liquor might be sold there and that the plaintiff was entitled to recover.¹

270. Truthful answers—Good faith is of the essence of the contract.—It has been said, that there is no more reasonable or necessary requirement than that when one party is induced to enter into a contract with another, the latter is required to give *bona fide* and intelligible information in regard to material matters of which the other is ignorant, and in no case is the rule more necessary than in applications for insurance.² The assured must answer truthfully all questions giving information material to the risk.³ Good faith is of the essence of the contract of insurance to a greater extent than in most other contracts.⁴

270a. True description an implied warranty—Insurance covers all effects falling within the description.—It is an implied warranty on the part of the insured that his description of the object of the insurance shall be such as to show truly under what class of risks it falls according to the proposals and conditions of the policy.⁵ An insurance upon effects indeterminately as being in a certain place is not limited to the particular effects which are there at the time of insurance, but attaches to all those falling within the description contained in the policy which are in the place at the time of the loss, unless a different intention is indicated in the policy.⁶

¹ Nicholson v. Phoenix Ins. Co., 45 Q. B., 359 Q. B. D.

² Gore v. Samo, 2 S. C. R. 411. ³ Quinlan v. Union, 8 A. R. 376.

⁴ Guardian v. Connely, 20 S. C. R. 208. Maclellennan, 17.

⁵ C. C. L. C. 2572, 1 Bell Com. 541. Ellis (Shaws) p. 48. Quennault nn. 174 et seq. Boudousquié n. 202, p. 241, nn. 104, 111, 112.

⁶ C. C. L. C. 2573. 2 Pardessus Dr. Com. n. 594, p. 480. Angell 101, § 2. Quennault Ass. 78, Boudousquié n. 122. See also *infra* chap. xvi.

270b. Where description of property did not imply a warranty.—The words “maison en bois à être lambrissée en brique,” contained in the description of the property, insured under the policy of insurance on which the action was brought, were held merely descriptive and did not imply a warranty that the house should be immediately covered with bricks, especially if the insurance had been renewed when the house was still in the same state.¹

270c. Warranty as to declaration of interest presumed renounced, if not invoked by insurer.—The duty of the insured, who is not owner, to declare his interest even when exacted as a warranty, is only a relative nullity which can be invoked by the insurer and the latter is presumed to have renounced it, if he does not invoke it.²

271. Misdescription of goods—Want of proof—In an action on an insurance policy issued by the respondents by which they insured certain articles known as “scythe sharpeners,” which were then being manufactured by the appellants, and also the materials used by the appellants for their manufacturing establishment, for a sum of \$800 :—After the insurance was effected the appellants moved their manufacturing establishment into a new building and obtained the consent of the respondents that the policy already effected should cover the risk in the new building. The respondents pleaded to the action that the insurance had been obtained by false and fraudulent representations as to the value, nature and quality of the goods insured, and that subsequently to the issuing of the policy the appellants represented that the risk in the new building was not increased, when in fact it was materially increased; that the appellants sustained no loss or damage, as the articles insured were worthless, and further, that no expertise was ever had as required by law. The court below dismissed the action, but the Court of Appeals reversed this judgment on the ground of want of proof of fraud or misrepresentation and allowed \$400.³

271a. Misdescription of premises — Agent's fault — Parol evidence.—When the application is referred to in the policy as forming part of it it will control its provisions where there is a variance with respect to description of the premises insured. A

¹ Northern Ins. Co. & Prevost 1 Q. B. R. 278.

² St. Armand v. Quebec Ass. Co., 9 Q. L. R. 162.

³ Holmes v. Mut. Fire Ins. Co. of Stanstead and Sherbrooke, 1 Q. B. R. 94.

misdescription in the policy, inserted there by the agent of the company, will be deemed the fault of the company, and parol evidence will be admitted to prove the intention of the assured.¹

271b. Misrepresentation as to value of property.—In effecting insurance, in all to the amount of \$5,200, the plaintiff represented the property as being of the cash value of \$5,339 on two occasions and \$5,500 on a third occasion. In an action on the policies the jury found that the value was \$4,000 when first insured, and \$4,200 when the additional insurance was effected; that the plaintiff had misrepresented the value, but not intentionally or wilfully; that it was not material that the true value should be made known to the company, and that the company intended that the goods should be insured to their value; and rendered a verdict in favor of the plaintiff for \$3,100, which the Divisional Court subsequently refused to set aside.

The court held (reversing the judgment of the court below) that under the circumstances, and in view of the nature of the goods insured, the overvaluation was such as under the first statutory condition in the policy rendered the same void.²

272. Description of building.—A policy of insurance describing the premises as a house bounded in the rear by a stone building covered with tin, and by a yard, in which yard there was being erected a first-class store which would communicate with the building assured, is not incorrect and not null, although it was proved that there was, between the house and the stone building, a brick building covered with shingles communicating at both doors, inasmuch as the omission to mention such doors in the description was not proved to have been a fraudulent concealment, and inasmuch as it was not established that the fire had been occasioned or had extended by means of such apertures.³

272a. Description of locality—Consent of agent to renewal—Application for insurance made by a clerk—Incomplete description.—A policy of insurance was effected on goods of the insured in No. 319 and the insurance was afterwards renewed without variation of its original conditions. Before the renewal the insured had extended his premises into No. 315, and the com-

¹ *Vezina v. Canada Fire & Marine Ins. Co.* 9 Q.L.R. 65, but see *infra* § 287d.

² *Moore v. Citizens Fire Ins. Co.* 14 A.R. 582.

³ *Casey & Goldsmith*, 4 L.C.R. 107, Q.B.

pany's agent visited the establishment and saw the position of both buildings occupied by the insured and the goods contained therein. A fire destroyed the goods in No. 315 and slightly injured those in No. 319. In an action on the policy claiming for the loss both in No. 319 and in No. 315, the jury found the facts as above stated and both parties moved for judgment on the verdict.

The court held, that, on the facts found by the jury, the judgment should be for the defendants as to the loss of goods in No. 315, the inspection of the premises by the company's agent, before the renewal of the policy, not being sufficient to establish an agreement to vary the terms of the policy in respect of the locality in which the goods were represented to be.¹

Where the policy covered plaintiffs shop, 29 William Street, with its contents, the agent had not seen the place and plaintiff's clerk who applied for the insurance did not mention that the furniture, painting and varnishing department was on the top flats of Nos. 25 and 27, which communicated with No. 29 through openings in the wall:—It was decided the policy did not cover the goods in Nos. 25.²

272b. Description of locality—Omission by agent.—On the 9th of August, 1871, the plaintiffs (respondents) applied to the defendants (appellants) through their agent H. at Hamilton, for an insurance on goods to the amount of \$6000, contained in a store on the south side of King Street, described in the application as No. 272 in defendants' special tariff book and marked No. 1 on a diagram endorsed in pencil by the secretary of the company at Montreal, the diagram being a copy of a diagram on a previous application for policies by insured. The premium was fixed at 62½ cents on the \$100 and was paid on the 10th August. On that day the plaintiff gave a written notice to H. that they had added two flats next door to their former premises (which would form part of No. 273 in defendants' special tariff book) and that part of their stock was then in these new flats. A few days later H. inspected the building and said the rate would have to be increased in consequence of the cuttings. On the 29th August H. notified defendants of the opening into the adjoining building, but did not com-

¹ Citizens Ins. and Invest. Co. & Lajole, M. L. R., 4 Q. B. 362, and see also Citizens Ins. Co. & Rolland, 1 L. N. 604, C. R. 21 L. C. J. 262, and Rolland v. North British and Merc. Ins. Co., 14 L. C. J. 69, S. C. 1899.

² Wilder v. Phoenix Ins. Co. 1 R. de J. 82.

municate the written notice in its entirety. An increased rate making it 1 per cent. was fixed and paid by the 23rd September, the agent issuing an interim receipt, dated back to the 9th August, for the full premium. The policy issued immediately thereafter, dated as of the 9th August, and referring to the diagram endorsed on the application of the insured, S. T. 272. On the policy there was an N. B. in reference to an "opening in the east end gable in the premises, through which communication was had with the adjoining house, occupied by one G." The policy was handed to the plaintiff in September, 1871, and the loss by fire occurred in March, 1872. The plaintiff brought an action in the Court of Queen's Bench (Ontario) on the policy, but failed on the express ground that the description therein did not extend to or cover goods which were in the added flats. Thereupon the plaintiffs filed their bill to reform the policy or restrain the defendants from pleading in the action at law that the policy covered only goods contained in S. T. No. 272. In the Supreme Court it was held by Richards, C. J., Strong and Taschereau, J.J., that the true construction of the application, written notice and interim receipt, had together established a contract of insurance between the plaintiffs and the defendants, embracing the goods situated in the flats added by plaintiff and that, notwithstanding the acceptance of the policy, which did not cover goods in the added flats plaintiffs were entitled to recover for the loss sustained in respect of the goods contained in such added flats.

Ritchie, Fournier and Henry, J.J., held, however, that the evidence did not establish an application for insurance on the goods in the added flats, nor an agreement for such insurance by the agent, but that the application, interim receipt or agreement were confined to the goods in the premises S. T. No. 272.

The court being equally divided the appeal was dismissed without costs.¹

272c. Building described as "isolated."—When the insured in his application described a building as "isolated" which it was in the ordinary sense of the term, a printed note on the application below the signature of the insured explaining "isolated" as meaning 100 feet from any building, did not bind the insured, he being in good faith and his attention not having been called to the note.²

¹ Liverpool and London and Globe Ins. Co. v. Wyld, 1 S. C. R. 604.

² Pacaud v. Queen Ins. Co. 21 L. C. J. 111.

273. Words importing an agreement considered a warranty.

—The Privy Council have held that if the words used import an agreement that the vessel shall navigate, then they must be considered as a warranty, and the engagement not having been performed, whether material or immaterial, the insurers are discharged. In the present case, the words used contained no contract to navigate, but merely indicated an intention, and therefore did not amount to a warranty.¹

In another case there was an express guarantee that the steamer insured should navigate, and the insurers were not answerable for the loss suffered by the burning of the boat while lying in the dock.²

274. Increase of risk—Steam saw mill on adjoining land.—

A condition of a fire insurance policy on a saw mill stated that "If the risk is increased or changed by any means whatever," without written permission of the insurers, the policy shall be void.

In an action on the policy for a loss the defendants pleaded that before the loss, without the written permission of the defendants, the risk was materially increased and changed by the placing of a portable steam saw mill within 99 feet of the plaintiff's mill.

The court considered (Wetmore and Tuck, J.J., dissenting), that the plea was bad in not alleging that the risk was increased by any act of the plaintiff or by his direction. That the erection of a steam saw mill by a stranger on land adjoining that on which the plaintiff's mill was built, as mentioned in the policy, did not come within the words of the condition—"if the risk is increased," etc.

A condition of the policy provided that the defendants should not be liable if the assured made any false representation of the condition, situation or occupancy of the property, or if he omitted to mention anything relating thereto material to be known in estimating the risk. The defendants pleaded that before the policy issued the plaintiff made a warranty that the supply of water power to his mill was ample during the whole year; that such statement was material to be known in estimating the risk, and that the policy was issued and the contract made on the face of such warranty, but that the supply of water was not ample for the whole year, either at the time of issuing the policy or of the loss.

¹ Privy Council, *Grant v. Aetna Ins. Co.*, 15 Moore's P.*C. Rep. 516, referred to *supra* § 267, but see §§ 237b and seq.

² *Q. B. Grant v. Equitable Fire Ins. Co.* 14 L. C. R. 493. See also *Pearson v. Com. Union Ass. Co.* 8 C.P. 548, 1 App. Cas. 498, reported *infra* Chap. XVI.

Demurrer on that ground that the alleged warranty was not stated to be a part of the contract of insurance, and therefore the breach of it was no defence to the action; also that the plea did not allege that the warranty was false to the plaintiff's knowledge.

The court held—Wetmore, King, Tuck, J.J. (Allen, C.J. and Palmer, J., dissenting) that the plea was good.

The distinction between a warranty and a representation was considered.¹

274a. Increase of risk by subletting—Additional insurance.—The plaintiffs effected insurance on premises described as being occupied by them as a bonded warehouse and by their tenants as offices, and sublet part of the premises to a common warehouseman to be used for the storage of goods, and also effected additional insurance on the property insured, without giving notice to the insurers, as required by the conditions endorsed on the back of the policy.

It was considered a breach of warranty on the part of the insurers, and that the policy in consequence was void and of no effect.²

274b. Increase of risk—Premises relet—Notice to agent and company.—In an Ontario case the plaintiff's premises being insured as "occupied by a tenant as a grocery store and dwelling," were relet to his son-in-law, who used them for dealing in furniture and had a small room behind the shop, in which he had a carpenter's bench and tools and did repairing and rough work. D., the defendants' local agent, was notified of this change and went on the premises and saw the tenant at work making a desk. He wrote to the head office at plaintiff's request, notifying them of this, and they answered that if the policy were sent with a letter of explanation they would consent in writing on it, adding "Is there woodwork done on the premises?" The matter was then allowed to drop.

The policy contained a condition that "any change material to the risk, and within the control or knowledge of the assured, shall void the policy as regards the part affected thereby, unless the change be promptly notified in writing to the company or its

¹ *Copp v. Glasgow & London Ins. Co.* 30 New Bruns. Rep. 197.

² *Chapman et al. v. The Lancashire Ins. Co. and Fraser* 13 L.C.J. 36, S.C. 1868; 2490 C. C. L. C.

local agent, and the company so notified may cancel the policy." The jury were asked whether the change was material, and whether it was fairly communicated to the defendants, and they found for the plaintiff.

The court held verdict should not be disturbed. *Semble*, that the transmission of the policy for endorsement was not essential.¹

274c. Increase of risk—Cotton dried in a tannery.—Certain premises insured as a tannery and leather dressing house were used for drying nine bales of cotton, a substance which it was proved was more inflammable than the stock of a tannery. Fire first appeared in the cotton. By a condition of the policy the use of the premises for more hazardous purposes voided the contract. The jury found that the drying of cotton was not a material alteration in use of the premises, and that the alteration had not increased the risk.

It was held, there being evidence that the insured by the use of the premises for drying cotton had increased the risk, the verdict was contrary to the evidence adduced and a new trial was ordered.²

274d. Increase of risk—Spool factory—Manufacture of excelsior.—In another case, decided by the Supreme Court of Canada, a policy on a building described in the application for insurance as a spool factory contained the following conditions: "That in case the above described premises shall, at any time during the continuance of this insurance, be appropriated or applied to or used for the purpose of carrying on or exercising therein any trade, business or vocation denominated 'hazardous' or 'extra hazardous,' or for the purpose of storing, using or vending therein any of the goods, articles or merchandise denominated 'hazardous' or 'extra hazardous,' unless otherwise specially provided for, or hereafter agreed to by the defendant company in writing, or added to or endorsed on this policy, then this policy shall become void. Any change material to the risk, and within the control or knowledge of the assured, shall void the policy as to that part affected thereby, unless the change is promptly notified in writing to the company or its local agent."

It was held, reversing judgment of court below, that the in-

¹ Peck v. Phoenix Mut. Ins. Co. 45 Q.B. 620, Q.B.D.

² C.R. Mooney v. Imperial Ins. Co. M.L.R. 3 S.C. 339, and see also Tessier v. Co. Ass. Mut. de Rimouski, 19 R.L. 145.

troduction, without notice to the company, of the manufacture of excelsior into the insured premises, in addition to the manufacture of spools, avoided the policy under these conditions, the evidence establishing clearly, and there being no evidence to the contrary, that such manufacture in itself was a hazardous, if not an extra hazardous, business, notwithstanding that on the trial of the action on the policy the jury found, in answers to questions submitted to them, that such additional manufacture was less hazardous than that of spools and did not increase the risk on the premises insured.¹

275. Construction of policy—Asylum for insane, main building.—The asylum for the insane, London, consists of a centre building containing all necessary accommodation for patients, etc., and a kitchen, laundry and engine room, built of brick and roofed with slate, situate some 50 feet to the rear of the middle of the centre building and connected with it by a passage or covered way with brick walls about 10 feet high and also roofed with slate, and with a tramway to convey food from the kitchen to the southern portion of the centre building. A policy of insurance against fire insured the "main building."

It was held, affirming judgment of Court of Appeal for Ontario and the Divisional Court, that the policy covered the kitchen, laundry and engine room.²

276. Insurance of a tug—A tug is not a building within the meaning of the clause of the tenth statutory condition.³

277. Warranty as to policies being identical, condition precedent.—In a very recent case in the English Court of Appeal, the clause in a fire policy, which was subscribed by the underwriter against whom this action was brought and others, was as follows: "Warranted to be at the same rate, terms, and identical interest as (two other insurance companies naming them and giving the amount to each.)"

In the policy of one of the two companies the premium and also the interest insured differed from those in the defendant's policy. The court decided, that the warranty must be taken to be a condition precedent; that the facts showed that there had

¹ *Sovereign Fire Ins. Co. v. Moir* 14 S.C.R. 612,

² *Supreme Court of Canada, Aetna Ass. Co. v. Atty.-Genl. of Ontario*, 18 S.C.R. 707,

³ *Mitchell v. City of London Fire Ins. Co.* 12 O. R., 706.

been a breach of the warranty ; and that the policy was consequently void and the underwriter not liable.¹

278. Employee's guarantee contract—Renewal—Misstatement.—By a contract in writing made in 1890 the defendants agreed to guarantee the plaintiff against pecuniary loss by reason of fraud or dishonesty on the part of an employee during one year from the date of the contract, or during any year thereafter in respect of which the defendant should consent to accept the premium which was the consideration for the contract. The defendants accepted the premium in respect of each of the three following years and gave receipts entitled “renewal premiums” :

It was held, the contract was a contract of insurance made or renewed after the commencement of the Ontario Insurance Corporations Act, 1892, within the meaning of section 33.

And also, that upon the true construction of sub-section (2) the contract could not be avoided by reason of misstatements in the application therefor, because a stipulation on the face of a contract providing for the avoidance thereof for such misstatements was not, in stated terms, limited to cases in which such misstatement was material to the contract.²

279. Concealment of other insurance and encumbrances.—Where the application for a policy of insurance calls for a statement of the encumbrances or other insurances on the property sought to be insured, failure to disclose all such encumbrances or other insurance amounts to a concealment which constitutes a cause of nullity of the policy.³

279a. Concealment of refusal of previous applications.—In a proposal by M. to an assurance office on his life, in answer to the question, “Has a proposal ever been made on your life at any other office or offices? If so, where? Was it accepted at the ordinary premium, or at an increased premium, or declined?” his answer was: “Insured now in two offices for £16,000 at ordinary rates. Policies effected last year.” The proposal was accepted, but the office having subsequently ascertained that the life of M. had been declined by several offices :—

¹ Barnard v. Faber (1893), 1 Q. B. 340.

² Village of London West v. London Guarantee & Accident Company, 26 O. R., 520, and see remarks of Rose, J., in this case *supra* § 268.

³ McKay v. The Glasgow & London Ins. Co. 32 L.C.J. 125, 1888. See also *infra* §§ 282 and 293.

It was held, there had been a material concealment, and that the office was entitled to have the contract set aside.¹

In the following case, where no question was asked, a different ruling was given. In this case a party applied to one agent of an insurance company and was refused the insurance, and afterwards applied to another agent of the same company and secured insurance through him in the ordinary mode and preceded by the usual enquiries. The fact that such party did not mention that he had before applied to another agent of the same company for insurance and was refused was not the concealment of a material fact rendering the insurance void.²

279b. Concealment of previous loss by fire and of previous refusal.—In a form of application for fire insurance the questions were asked: "Have you ever had any property destroyed or damaged by fire? If so, when and where?" Also: "Has this risk been refused by any company, or has any company cancelled a policy or receipt on it?" To both which questions the applicant answered "No," and signed a memorandum at the foot of the application form, whereby he covenanted and agreed with the company that the foregoing was a just, true and full exposition of all the facts and circumstances in regard to the situation, condition, value and risk of the property to be insured, and that it should be held to form the basis of the liability of the company and form a part and be a condition of the insurance contract.

As a matter of fact the insured had had other properties, but unconnected with the property now in question, destroyed by fire.

It was decided that the answer to the first of the above questions was immaterial to the risk.

And also, that the answer to the second question was clearly a warranty, having reference as it had to the property to be insured, and the only point for the jury's decision was as to its truth.³

279c. Concealment of refusal on account of fires.—The concealment by the insured of the fact that the risk had been refused by another company in consequence of two fires having

¹ London Assurance v. Mansel, 11 Ch.D. 363.

² Goodwin v. Lancashire Fire & Life Ins. Co. 18 L.C.J. Q.B. 1, referred to *supra* § 286. See also *supra* § 287 and *infra* §§ 279b and 290b.

³ Stott v. London & Lancashire Fire Ins. Co. 21 O.R. 312.

occurred previously on the same premises under suspicious circumstances is a material concealment and renders the contract void.

The holding in this case was that where an insurance company has refused to insure, because several times buildings similar to the one sought to be insured and belonging to the same owner had been burnt, each time under the same circumstances, this fact must be declared by the assured when he applies for a new insurance, as it is of a nature to increase the risk, and concealment of the insured on this point is a cause of nullity of the contract.¹

279d. Concealment of danger from incendiarism.—A mere threat to burn plaintiff's store, made during an election excitement and several months prior to an insurance being effected, is not such a threat, the omission to declare which at the time of effecting the insurance would amount to a concealment of a material fact.²

In a recent Ontario case, where in the application the assured was asked whether any incendiary danger to the property was threatened or apprehended, and untruly answered "no", the policy was held avoided.³

Upon the same point of concealment in another action a fire policy dated 21st May, 1879, was effected on the ordinary contents of a barn which was at the time of the insurance empty, and on a reaping and threshing machine. This barn was on the east half of the lot, the plaintiff's homestead and home buildings being on the west half, some distance across the road.

In the application for the insurance dated the 13th May, 1879, plaintiff answered "no" to the question, "Is there reason to fear incendiarism or has any threat been made?" On the same day the plaintiff had obtained another policy from defendants on his dwelling house and home buildings, the same question and answer being contained in his application therefor; and the thresher and reaper in question were then in the home buildings. A fire occurred on the 28th October, 1879.

At the trial it appeared that one M., the plaintiff's hired man, about the 8th May, had threatened to beat the plaintiff, and the latter, who was a nervous timid man, being alarmed had had the

¹ C. C. L. C. 2485-2487. *Minogue v. Quebec Fire Assurance Co.*, M. L. R. 1 S. C. 417 and 478 and 8 L. N. 340 and 377. 1885. See, however, *Goodwin v. Lancashire*, *supra* § 279a.

² *Kelly v. Hoch. Mut. Ins. Co.* 24 L. C. J., 296. 3 L. N. 63 and see *infra*

³ *Findley v. Fire Ins. Co. of N. A.* 25 O. R. 515.

premises insured ; that he had sat up and watched for a night and that he believed the premises had been set on fire. He denied having any reason for fear, except as to his home buildings. At the time of the fire the barn contained some grain and hay and the threshing and reaping machine, for the loss of which this action was brought. One of the conditions of the policy was, that if the assured misrepresented or omitted to communicate any circumstances material to be made known to the company, in order to enable them to judge of the risk, the policy would be avoided.

The court was of opinion that the plaintiff could not recover, for the plaintiff having admitted his own belief in the danger and acted upon it, his answer to the above question was untrue.

Per Cameron, J. :—The question was equivalent to "Have you reason to fear, or do you fear incendiarism?" and though the bodily threat did not furnish valid grounds for believing that incendiarism was to be feared from the person threatening, yet, since the insurance was effected on account of such fear, there was a clear misrepresentation in answering the question, and it made no difference that the property to be covered by the policy was not in existence at the time the insurance was effected.

Armour, J., *diss.*: The word "incendiarism" commonly applies to buildings only, and should not be extended in this case to cover personal property. The question should be construed strictly with reference to some particular ground of fear, otherwise the answer "no" referring to the first part only, viz. : "Is there reason to fear incendiarism" would be in every instance untrue, for every insurance is effected because the assured fears the happening of fire by accident, neglect or design. And the evidence in this case showed that there was no such reason as, operating on the minds of a majority of prudent men, would cause them to fear incendiarism, and therefore the question was truly answered. The question was also properly answered as to the property covered by this policy, for the fear extended only to the home property, and as to the property intended to be covered by the policy but not then in existence, such as the crops, as to which no fear could exist.¹

In answer to a question put by one company in an application for insurance on a mill : "Have you any reason to believe your

¹ Campbell v. Victoria Mut. Fire Ins. Co. 45 Q.B. 412, Q.B.D.

property is in danger from incendiarism?" And by another: "Have you any reason to suppose that your property is in danger of incendiarism?" the applicant B. replied to each in the negative. It appeared that the mill had been burned some months previously, and that the origin of the fire was unknown, and that threats had been made to B. by one R., an intemperate man, who was accustomed to indulge in threats to which no one paid any attention to burn down the mill. An anonymous letter had also been received threatening incendiarism. Persons supposed to be tramps had been seen about the premises, and B. had warned the watchman to be careful, and mentioned that he had received the anonymous letter :—

It was held, reversing decree of Spragge, C., that the answers were such a misrepresentation as avoided the policy.¹

The question put by the company in another case was "Is there any incendiary danger threatened or apprehended?" which B. answered in the negative. This was a misrepresentation which avoided the policy.²

In a case where insured testified that, having made complaints against a person who was convicted of a crime, he was threatened by the father of the person so convicted that he would fix him, the Supreme Court of New York held, that an exception to a refusal to instruct that, if the insured believed when he applied for the policy that there was danger of an incendiary burning of his property, and did not disclose that fact in his written application, he could not recover, was not well taken.³

280. Concealment of planing machine, etc.—Insurance was effected on a saw-mill, without disclosing the fact that the building contained a planing machine. This was held a material fact which it was incumbent on the insured to disclose, and the concealment of it rendered the insurance null and void.⁴

In an older case, however, it was said the failure of assured to disclose the existence of a fulling mill under the same roof as the buildings insured and destroyed by fire, is not a material concealment or misrepresentation, although it be proved that,

¹ Greet v. Citizens Ins. Co. referred to *supra* § 267, and do v. Royal Ins. Co. 27 Gr. 121, 5 A.R. 506, but see Kelly v. Hochelaga Mut. Ins. Co. 24 L. C. J. 298, *supra*.

² Greet v. Mercantile Ins. Co. 5 A. R. 506.

³ Smith v. Home Ins. Co. (1883), 47 Hun. 30.

⁴ Aitkin & The National Insurance Co., 1 L. N. 531, Q. B. 1878.

had a disclosure been made, the premium of insurance would have been much in excess of that charged, when the plaintiff's witnesses concur in stating that the risk was not thereby increased.¹

In another case it was held there was concealment on the part of the insured in not stating that a wing alleged to contain merchandise, was also partially occupied as a kitchen, and such concealment, although not fraudulent, voided the insurance.²

281. Misrepresentations as to state of health.—As we have seen³ under the Civil Code of Lower Canada the declaration in the policy of the age and condition of health of the person upon whose life the insurance is made, constitutes a warranty upon the correctness of which the contract depends. Nevertheless, in the absence of fraud, the warranty that the person is in good health is to be construed liberally and not as meaning that he is free from all infirmity or disorder.⁴

The question was recently decided in Quebec where a person desirous of becoming a member of a mutual life assurance company declared that he was in good health, while in fact he was suffering from a serious disease likely to shorten his days; the assurance was declared null on account of such misrepresentation.⁵

281a. Misrepresentations as to state of health—Policy in favor of creditor—Return of premiums.—An unconditional life policy of insurance was issued in favor of a third party, creditor of the assured, "upon the representations, agreement and stipulations" contained in the application for the policy signed by the assured, one of which was that if any misrepresentation was made by the applicant, or untrue answers given by him to the medical examiner of the company, the premiums paid would become forfeited and the policy be null and void.

Upon the death of the assured, the person to whom the policy was made payable sued the company, and at the trial it was proved that the answers given by the applicant as to his health were untrue, the insurer's own medical attendant stating that insured's was a life not insurable.

¹ *Wilson v. State Fire Ins. Co.*, 7 L. C. J. 223.

² *Barsalou v. Royal Ins. Co.*, 15 L. C. R. 1.

³ *Supra* § 268.

⁴ *C. C. L. C.* 2588, *Marshall* 772. *Ellis (Shaws)* c. 2, p. 205.

⁵ *Masson v. L'Association de Prévoyance Mutuelle du Canada*, 29 L. C. J. 161, S. C. 1884.

It was held that the policy was thereby made void, *ab initio*, and the insurer could invoke such nullity against the person in whose favor the policy was made payable, and was not obliged to return any part of the premiums paid.

Also that the statements constituting the misrepresentations being referred to in express terms in the body of the policy, the provisions of ss. 27 and 28 R. S. C., c. 124, could not be relied on to validate the policy, assuming such enactments to be *intra vires* of the Parliament of Canada, which point it was not necessary to decide.

Also that the indication by the assured of the person to whom the policy should be paid in case of death, and the consent by the company to pay such person, did not effect novation; Art. 1174, C. C., and the provisions contained in Art. 1180, C. C., are not applicable in such a case.

It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the assured were not made parties of the case.¹

281b. Misrepresentations—Policy in favor of third party.—The plaintiff effected a policy of insurance with the defendants on the life of K. M. P., which was under the seal of the defendants, but the plaintiff was not made a party to it. In it was a proviso "that if the declaration under the hand of the plaintiff delivered at the defendant's office as the basis of the insurance is not in every respect true, then the assurance shall be void." On proposing the insurance the plaintiff had answered in writing certain questions, and at the foot he had signed as the person proposing the insurance, a declaration, "I declare that the above particulars are truly set forth."

It was held, that proviso in policy (by terms of which the plaintiff was bound, having accepted it) avoided the insurance if the particulars in the declaration were untrue in fact on a material matter, although not untrue to the plaintiff's knowledge.²

281c. Misstatement of date of birth and of disease.—On an application for insurance in a mutual assessment insurance society, the applicant declared and warranted that if in any of the

¹ Supreme Court of Canada, *Venner v. Sun Life Ins. Co.*, 17 S. C. R. 304, referred to *supra* § 268.

² *Macdonald v. Law Union Fire & Life Ins. Co.* L.R. 9 Q. B. 328 referred to *supra* § 267.

answers there should be any untruth, evasion, or concealment of facts, any bond granted on such application should be null and void.

In an action against the company on a bond so issued it was shown that the insured had misstated the date of his birth, giving the 19th, instead of the 23rd, of February, 1835, as such date; that he had given a slight attack of apoplexy as the only disease with which he had been afflicted, and the company contended that it was, in fact, a severe attack; that he had stated that he was in "perfect health" at the date of the application, which was claimed to be untrue; that he had suppressed the fact of his being subject to severe bleeding at the nose; and that the attack of apoplexy, which he had admitted had occurred five years before the application, had in fact occurred within four years.

The trial judge found that the misstatement as to date of birth was immaterial, as it could not have increased the number of years on which the premiums were calculated; that the attack of apoplexy was a slight, not a severe attack; that the applicant was in "good" if not "perfect" health when the application was made; that the bleeding at the nose to which the insured was subject was not a disease and not dangerous to his health; but that the misstatement as to the time of the occurrence of the attack of apoplexy was material, and on this last issue he found for the society, and on all the others for the plaintiff.

The court *en banc* reversed this decision and gave judgment for the plaintiff on all the issues, holding that as to the issue found by the trial judge for the society, there was a variance between the plea and the application which prevented the society from taking advantage of the misstatement.

On appeal, the Supreme Court of Canada held, Gwynne and Patterson, JJ., dissenting, that the decision of the court *en banc*, 20 N. S. Rep. 347, was right, and should be affirmed.¹

281d. Concealment of a disease.—The bond of membership in an insurance society insured the members holding it "in consideration of statements made in the application herefor, etc.," and in a declaration annexed to the application the insured agreed that the bond should be void if the statements and answers to questions in the application were untrue.

¹ Supreme Court of Canada, *Mutual Relief Soc'y. of N. S. v. Webster*, 16 S. C. R. 718.

The application was held a part of the contract for insurance and incorporated with the bond.

The said declaration warranted the truth of the answers to the questions and of the statements therein, and agreed that if any of them were not true, full and complete, the bond should be null and void. One of the questions to be answered was: "Have you ever had any of the following diseases? Answer opposite each: yes or no." The names of the diseases were given in perpendicular columns, and at the head of each column the applicant wrote "no," placing under it and opposite the disease named marks like inverted commas. On the trial of an action to recover the insurance on a bond issued pursuant to this application, it was found that the applicant had had a disease opposite to which one of these marks had been placed.

It was held, affirming judgment of court below, that whether the applicant intended this mark to mean "no" and thus deny that he had had such disease, or intended it as an evasion of the question, the bond was void for want of a true answer to the question.

In this case it was argued that the Insurance Act, R. S. C., c. 124, applied to the defendant company, and that the benefit of the application could not be claimed, as it was not contained in or endorsed on the policy as required by sections 27 and 28 of the statute; but the court did not consider it necessary to determine the point.¹

On the question of disease, in the very recent case of the *Canadian Ins. Co. v. Telesphore Pilot*² it was held, confirming the judgment of Mathieu, J., that in the absence of bad faith on the part of the assured, the omission to mention a disease from which he had been suffering for a long time previously without his constitution being affected thereby, could not vitiate the contract.

Under a recent New York decision, a concealment of the fact that the insured is sick when application is made for re-instate-

¹ Supreme Court of Canada, *Fitzrandolph v. The Mut. Relief Society of Nova Scotia*, 17 S. C. R. 333, and see judgment of Gwynne, J., at p. 340. See, however, *Sinclair v. Can. Mut.*, 40 U. C. R. 206, 212; *American Ins. Co. v. Pieul*, 9 Penn. 520; *Liberty Hall Ass. v. Housatonic Co.*, 6 Gray 186; *Nicholls v. Fayette Mut.*, 1 Allen (Mass.); *Phoenix Co. v. Roddin*, 120 U. S. 183; *Millar v. Phoenix Mut. Co.*, 107 N. Y. 292, 301. See also preceding paragraph.

² R. J. Q., 5 Q. B. 521.

ment will avoid whatever may have been done towards re-instatement.¹

An insurance case was recently decided in Quebec on this question of health. An action had been taken out by the widow of the late Fabien Gauthier for a thousand dollars against the Metropolitan Life Insurance Company, the amount of a policy upon the life of her husband. The company contended that it could not pay the policy on the grounds that Gauthier had not given full information regarding his physical condition when he was insured. Evidence was given to the effect that when applying for the policy deceased had declared he was in good health, whereas he had been ill for four years; that he had been spitting blood, and that, in brief, he was suffering from consumption when he got the policy, and that he had died from that complaint. Moreover, evidence was adduced that he had been unable to work for many months, and that he had received aid from the Catholic Order of Foresters. The Court, under these circumstances, said that there was nothing to be done but to dismiss the action taken against the company by the widow.²

281e. Misstatement as to age and health.—Where an applicant for life insurance in answer to a printed question misstates his age or declares that his health is good, whereas it is bad, or fails to disclose the names of his medical attendants, though he had them, and answers as if he had none, and upon such answers, which are made to form a part of the contract, a policy is issued by the insurer, such policy is void. And it was said in this case that generally false statements made by the applicant for insurance absolutely void the policy.³ This is not the law to-day.⁴

281f. Intemperate habits.—A. applied to an insurance office to effect a policy on his life. He received a printed form of proposal containing questions. Among these was the following:—“Question 7. (a) Are you temperate in your habits? (b) And have you always been strictly so?” A. answered: (a) “temperate;” (b) “yes.” Subjoined to the printed questions was a declaration which A. signed to the effect that the foregoing statements were

¹ *Marshall v. Women's Mut. Ins. & Acc. Co. of America* (1890), 58 N. Y. Super. Ct. 406.

² *Cusson v. Metropolitan Life Ins. Co.*, 3 April, 1897 not yet reported.

³ *Hartigan v. International Life Assce. Soc.* 8 L.C.J. 203.

⁴ See *supra* § 267 and seq.

true, and that the assured agreed that this declaration should be the basis of the contract, and that if any untrue averment, etc., was made the policy was to be absolutely void, and all the moneys received as premium forfeited. The policy recited the above declaration as the basis of the contract. After A.'s decease the insurance company refused payment of the policy on the ground that the above-mentioned answer was false in fact.

In action on the policy it was held, reversing the decision of the court below, that the declaration of A. taken in connection with the policy constituted an express warranty that the answer to question 7 was true in fact, and as the evidence clearly proved that A.'s averment as to his temperance was untrue, the policy was absolutely null and void.

Life Association of Scotland v. Foster (11 Court Sess. Cas. 3 series, 351) distinguished; *Hutchison v. National Loan Association Co.* 7 (Court Sess. Cas. 2 series, 467) not approved of.¹

281g. Intemperate habits—Assignment of policy.—An application for life insurance signed by the applicant contained in addition to the question and answer, viz.: "Are your habits sober and temperate? A. Yes," an agreement that, should the applicant become as to habits so far different from the condition in which he was then represented to be, as to increase the risk on the life insured, the policy should become null and void. The policy stated that "if any of the declarations or statements made in the application of this policy upon the face of which this policy is issued shall be found in any respect untrue, in such case the policy shall be null and void."

On an action on the policy by an assignee, it was proved that the insured became intemperate during the year preceding his death, but medical opinion was divided as to whether his intemperate habits materially increased the risk.

It was held on the merits per Ritchie, C.J., Strong, J., (Fournier and Henry, J.J., *contra*) that there was sufficient evidence of a change of habits which in its nature increased the risk on the life insured to avoid the contract.

The appellant's interest in the policy was as an assignee of Dame M.H.B., the wife of one Charles L., to whom the insured had transferred his interest in the policy on the 27th October, 1876.

¹ Thompson v. Weems, 9 App. Cas. 671.

And, per Strong, Taschereau and Gwynne, J.J., that the appellant had no *locus standi*, there being no evidence that M.H.B. had been authorized by her husband to accept or transfer said policy.¹

232. Concealment and misrepresentation of encumbrances and title.—In an action for \$1,000 insurance on house, furniture, etc., the plea was that by his application, which formed the basis of the insurance, plaintiff had falsely declared that there was no encumbrance on the property, whereas there was a hypothec exceeding \$107. In the application the 12th question was: "What encumbrance, if any, is now on said property?" Answer: "Not any." Plaintiff, examined as a witness, admitted that the the last \$100 of the purchase money with interest was only paid on the 26th of August, 1878, the fire having taken place on the 3rd January, 1878. He subsequently sold the land for \$232.

It was held, dismissing the plea, that as mortgage did not affect the risk, and as there was no evidence of bad faith on the part of plaintiff, that he was entitled to recover.²

The failure to disclose all existing mortgages upon the property insured, in answer to a specific question upon the subject, even in the absence of an express condition in the policy, is cause of nullity.³

In the prescribed manner, there was endorsed on plaintiff's policy an addition to the first statutory condition, a condition providing that any fraudulent misrepresentation in the application, or any false or incorrect statement representing the title or ownership of the applicant, or the concealment of any mortgage or execution or any encumbrance on the property or on the land on which it was situate, should avoid the policy unless the directors in their discretion should see fit to waive the defect.

In his application the plaintiff stated that the land on which the building proposed to be insured was situated was encumbered by a mortgage for \$1,500, but omitted to disclose that it was also charged, together with other property, with a small annuity in favour of his father. The omission was not explained, but it was not attributed to any fraudulent intent. The defendants pleaded

¹ Supreme Ct. of Canada, *Boyce v. The Phoenix Mut. Life Ins. Co.* 14 S.C.R. 723.

² *Ducharme v. The Mutual Fire Ins. Co. of the Counties of Laval, Chambly and Jacques Cartier*, 2 L.N. 115, S.C. 1879.

³ *Mackay v. Glasgow & London Ins. Co.* M.L.R. 4, S.C. 124, see *supra* § 279 and *infra* § 293.

that the non-disclosure of that charge avoided the policy under the first statutory condition, or the above addition thereto. The jury found that the existence of the annuity was not material to be made known to the defendants:—

It was held, affirming judgment of the Q. B. D. (14 O. R. 506): (1) That the non-disclosure of the annuity was the concealment of an encumbrance within the meaning of the added condition. (2) That the added condition was not a just and reasonable one, because it was not limited to such facts or matter as were material to be made known to the company. (3) That the Divisional Court might determine, whether the condition was a just and reasonable one, and that it was not necessary that it should first have been raised at the trial.¹

Semble, the first statutory condition applies to matters of title or encumbrances, or relating to the "moral" as well as the "physical" risk, where the policy is based upon an application in which the insured is interrogated as to such matters.²

The plaintiff and his brother, being joint owner of land which their father had conveyed to them, subject to a mortgage to C., gave a mortgage to the father to secure the balance of purchase money, the father covenanting to pay C.'s mortgage. Under an agreement with his father and brother, the plaintiff, who was a carpenter, at his own expense built a dwelling-house for his own use, on a quarter of an acre of the land, the agreement being that, if the brothers should not be able to pay for the land, the plaintiff should have the house as his own. The house was placed on blocks of wood, and was held by its own weight on them.

The plaintiff, in his application for insurance on the house and contents, in answer to the question—"Title, held in fee, or how?" answered, "In fee," and to the question—"Incumbered or not? If yes, to what amount—how much land does incumbrance cover, and for what purpose erected?" He answered, "None." But he stated to the agent that there was on the land a mortgage, but nothing against the house, which he held in fee unincumbered. There was a condition on the policy that the incumbrance should be disclosed, and that the failure to do so would avoid the policy.

¹ Reddick v. Saugeen Mutual Fire Ins. Co., 15 A. R. 363, referred to *supra* §§ 247, 249 & 258 and *infra* § 285a.

² Klein v. The Union Fire Ins. Co., 3 O. R. 234, p. 941, approved and distinguished. *Ib.* See Ottawa Agricultural Ins. Co. v. Sheridan, 5 S. C. R. 157, p. 938.

The verdict was for the plaintiff:—

It was held, (*Armour, J., diss.*), that the house was not insured as a chattel, but as realty; and that the failure to disclose the incumbrance was fatal. Per *Cameron, J.*, that the house was a fixture, and subject to the mortgage. The condition was, that in case of any misrepresentation or omission to communicate any material circumstance, the insurance should be of no force "in respect to the property in regard to which the misrepresentation or omission is made." Per *Cameron, J.*: The policy was avoided only as to the insurance on the house. The directors passed a resolution to pay the loss, in ignorance of the fact that the incumbrance existed, and made an assessment to meet it, but on discovery rescinded this resolution:—Also, that the defendants had not by the resolution waived their right to set up the defence. Per *Armour, J.*: The house was a chattel, and there was nothing in the application to stop the plaintiff from asserting that it was not insured as part of the land.¹

The plaintiff effected insurance on buildings and chattels therein, specific amounts being placed on each. By the application in answer to questions to that effect, the plaintiff stated that the premises were held in fee simple and were unencumbered; and at the end thereof there was a provision that where property was heavily encumbered, or the value of buildings as compared with the amount insured on ordinary contents was small, the manager, etc., was authorized to insert the two-third's clause. The application was made part of the policy, which contained the statement that the premises were represented in the application as being held in fee simple and unencumbered. It was also so stated in the proofs of loss.

By the first statutory condition, if the insured misrepresented or omitted to communicate any circumstance material to be made known to the company to enable them to judge of the risk, the insurance should be of no force as respects the property misrepresented, etc. The property herein had been conveyed to the plaintiff by his father in consideration of natural love and affection, but subject to a charge to support the father and a brother and to other charges, and on default the plaintiff was to stand seized to the use of the father of the land, which should immediately revert in him as before:—

¹ *Phillips v. Grand River Farmers' Mutual Fire Ins. Co.*, 46 Q. B. 334.—Q. B. D.

It was held that under first statutory condition, in order to cause the misrepresentation as to the property to avoid the policy, it must be material, which was a question for the jury to decide ; and that the misrepresentation only applied to the building and not to the chattels :—

And, also, that the fifteenth statutory condition which provides that “ all frauds or false swearing in relation to any of the above particulars, shall vitiate the claim,” did not apply to the statements as to title or encumbrances, for it referred to the particulars contained in the thirteenth statutory condition, items (a) to (e), which had no relation whatever to such statements.

The judge at the trial having entered a verdict for the defendants, on the ground that the misrepresentation itself avoided the policy, a new trial was directed.¹

A fire policy contained condition, in addition to statutory ones, to the effect that if the property were alienated, or any transfer or change of title occurred, or if it were encumbered by mortgage, without the consent of the company, or if the property should be levied upon under process of law, the policy should cease.

In answer to the question whether the property was mortgaged, the assured answered “ \$5,000 to F. L. & S. Co.” There were at the time, in fact, two mortgages to that company, on which \$6,160 were due. After the policy a mortgage was given to secure endorsements and was discharged, and another was given by the plaintiff to his partners who retired from the firm, but the company was not apprised of either.

The jury found that the representations as to encumbrances were false, but not made fraudulently, and a verdict was entered for the defendants :—

It was held, that representation as to encumbrances was a violation of the condition, and that the verdict was right. Per Hagarty, C. J : Though that part of the condition as to levying might be unreasonable (5 A. R. 605), the remainder was not, and the condition was divisible.²

In answer to the questions, “1. Are the premises occupied by owner or tenant ? 2. If by tenant, give name of owner,” a party seeking to effect an insurance against fire answered : “ 1. Tenant,

¹ Goring v. London Mutual Fire Ins. Co., 10 O. R. 236.—C. P. D. referred to *supra* § 267. See S. C., 11 O. R. 82, p. 980.

² Wilby v. Standard Ins. Co., 3 O. R. 115.—Q. B. D.

as boarding house. 2. Applicant." And another question was: "If the applicant is the owner of the said building—state the value of the building and land, and he answered \$600. In fact, the applicant did not own the land, having a lease of it which had only a short time to run, with the right to remove the building, the subject of insurance:—

It was held, this was such a misrepresentation of the interest of the applicant as rendered the policy void under the first of the statutory conditions in the policy.¹

In another case decided by the Supreme Court of Canada, by a contract in writing M. agreed to cut and store a certain quantity and description of ice, the said ice houses and implements to be the property of P., who after the completion of the contract was to convey same to M.; the ice was to be delivered by M. on board vessels to be sent by P. during certain months; P. was to be liable to accept and pay for only good merchantable ice delivered and stored as agreed. The property on which the buildings for storing said ice were situate was leased to P. by the owner, the lease containing a covenant by the owner to grant a renewal to M. A bill of sale was made by M. to a third party of the buildings on said land. M. effected insurance on the whole stock of ice stored, and in his application, to the question, "Does the property to be insured belong exclusively to applicant or is it held in trust or on commission, or as mortgagee?" he answered, "Yes, to applicant." The application contained a declaration that the same was a just, full and true exposition of all the facts and circumstances in regard to the condition of the property so far as known to the applicant and so far as material to the risk, and it was to form the basis of the liability of the company.

The property insured was destroyed by fire, and payment of the insurance was refused on the ground that the property belonged to P. and not to M. In an action on the policy, the defendants endeavored to prove that other insurance on the same property had been effected by T., and set up a condition in the policy that in such case the company should only be liable to pay its ratable proportion of the loss. This condition was not pleaded, and the policies to P. were not produced, nor the terms of his insurance proved. Evidence was given, subject to objection as to

¹ *Compton v. Mercantile Ins. Co.*, 27 Chy. 334.—Chy. D., referred to *supra* § 109.

its admissibility, that P. had effected insurance to cover advances made to M. on the ice, and had been paid his loss. The plaintiff obtained a verdict for the full amount of his policy, which was affirmed by the Supreme Court of New Brunswick in *banc*.

It was held, affirming decision of the court below, that the whole property in the ice insured was in M.; that the clause in the agreement stating that the ice house and implements were to be the property of P. meant that the buildings and implements only were to pass to P., as he was to convey the property vested in him by the agreement to M. on completion of the contract, and could not so convey the ice which M. was to deliver on board vessels, which he could not do unless it was his property.

And, further, that the declaration in the application did not make M. pledge himself to the truth of the statements therein absolutely, but only so far as known to him and as material to the risk, and questions of materiality and knowledge were for the jury, who found them in favor of M.

And, also, Strong, J., dissenting, that the declaration was not a warranty of the truth of the statements, but a mere collateral representation.

Per Strong, J.: It was a warranty, but as it was confined to matters within the knowledge of M. and material to the risk, the result was practically the same.

And, as to the further insurance, that the condition should have been pleaded, but if available without plea it was not proved; what evidence was given should not have been received.

Per Strong, J.: It was not shown that P.'s insurance was on the ice insured by M., who was not bound to deliver any specific ice under the contract.

Per Gwynne, J.: The damages should be reduced by the amount received.¹

In another case the appellants issued to respondents, in consideration of \$190, a policy of insurance to the amount of \$3,000, as follows, viz.: \$1,000 on their building, and \$2,000 on the stock. In the respondent's application, which had been signed in blank and delivered to the person through whose instrumentality the policy was effected, it was stated that there were no encumbrances on the property, although there were several mortgages.

¹ North British & Merc. Ins. Co. v. McLennan, 21 S. C.R. 288. referred to *supra* § 267.

It was also proved that after the issuing of the policy the respondents effected a further encumbrance on the land, and did not notify defendants.

The policy was made subject to 36 Vic. c. 44 (O.). The proviso (since repealed by 39 Vic. c. 7) to s. 36 declared: "That the concealment of any encumbrances on the insured property or on the land on which it may be situate shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the board of directors shall see fit in their discretion to waive the defect." One of the conditions of the policy provided that the policy should be made void by the omission to make known any fact material to the risk.

On an action upon the policy, the Court of Common Pleas refused to set aside the verdict in favour of the appellants, but on appeal to the Court of Error and Appeal for Ontario it was held the policy was divisible and that respondents were entitled to recover the insurance on the stock.

The Supreme Court said that the contract on the building and on the stock was entire and indivisible, and that the misrepresentation as to encumbrances, by the conditions of the policy, as well as by 36 Vic. c. 44 (O.), s. 36, rendered the policy wholly void.¹

282a. Indivisibility and divisibility of insurance.—Insurance is at times divisible and at times indivisible.² The objects insured, being distinct and in different situations, make as many insurances as subjects.³ Reticeance as to one by the assured may not be fatal to the whole policy.⁴

Avocat Général Reverchon made a strong argument for indivisibility in a case where a policy was issued covering different subjects for different sums, and the insured had been guilty of fraud, leading to insurance, as to one subject. Yet, the original court held the policy in this case to involve two contracts, and the Cour de Cassation said it could not interfere in such case. The editors seem to question this ruling.⁵

¹ Supreme Court of Canada, *The Gore District Mutual Fire Ins. Co. v. Samo*, 2 S. C. R. 411. Bramwell, B., in *Hains v. Venables*, L. R. 7 Ex. 240, was approved, and in New Brunswick the same has been held. See 2 S. C. R. 423: see also *infra* § 282a.

² See also preceding paragraph. ³ *Journal du Palais*, A.D. 1877, p. 1885.

⁴ *Ib.* ⁵ *Ib.*

Where a man insured £1,000 on his house and £500 on his furniture in that house, the obligation of the insurers might be indivisible or divisible, according to circumstances. If the house be described as covered with slates, whereas it was covered with shingles, and it burned, the insurers need not pay for it, nor need they for the furniture burned with it, under first clause.¹

In another case buildings were insured on two lots. One lot was mortgaged. The application required all mortgages to be stated. The insurance company's agent seems to have written the application. He was held the applicant's agent, for so the application itself ordered. The insurance was vitiated totally, the mortgage not being stated.²

Some policies contain a clause as to description of interest, that if the interest is misdescribed in the application, the policy shall be void; also another clause as to claim sworn to after the fire, that if false or fraudulent in any particular the policy shall be void. Judge Mackay discusses the effect in a case where by one policy many different subjects are insured, as house, furniture in it, movables elsewhere, value stated, and a rate, say, of one per cent. on all, and the house not belonging to the insured. Is his whole policy null? *Semble*, it ought not to be. Can it be said that the risk is greater of a house not belonging to assured? It ought to be held that the policy did not have this effect. Then, suppose the same case, but all to belong to the assured, and after the fire the claim to contain a fraudulent statement of some of the loss (*e.g.*, some subject alleged lost that was not lost or values of some of the movables sworn to at double their value) ought the whole policy to be avoided? It would seem that it ought if it contain a clause to that effect. Again, in a case the same as the last, with a clause reading: "If coal oil or benzine be used in the house insured this policy to be void." Ought the total policy to be avoided if coal oil be used? In France they lean against divisibility. But, if a house is described as covered with slate or built of brick, when one or the other is not the case, the policy is null even as to movables in it, where the description is material.³

In some of the United States it is held that where a policy of insurance covers different kinds of property the contract is entire,

¹ Aguel, p. 64, Arrêt of 1851.

² Bleakley v. Niagara Dist. Mut. Ins. Co., 5 Bennett's Fire Ins. Cases, 277.

³ 13 L.N., 364.

although the valuation and amounts of insurance are severally applied to the different classes of property and that a breach of the warranty as to any portion of the subject of insurance vitiates a policy as a whole, especially when the consideration is entire. But that is not the doctrine in New York.¹

The misrepresentations as to encumbrances upon realty in the application for insurance will not avoid the policy, so far as it relates to the personal property insured therein. This was the holding of the Missouri Appellate Court.²

This rule has been qualified, however, in an Alabama case as follows: When a policy of insurance covers a building and personal property included in it, or so attached that its loss would be the natural consequence of the destruction of the building, as a dwelling house and furniture, or engine house and fixtures, a false warranty as to the building avoids the whole policy.³

283. English views upon concealment—Concealment by broker—Misrepresentation innocently made.—There has been before the English courts a case in which insurers of a marine risk had effected reinsurance through their broker and before the negotiation was completed this broker had become informed of a disaster to the vessel insured, which information was not communicated by him to his principal and was withheld from the reinsurers. The latter, when action was brought against them, placed their defence upon the avoidance of the policy by reason of this concealment of material facts.

There was a full discussion in the different courts before whom the case came and it is valuable as a recent exposition of the law upon the subject of concealment as well as its bearing upon agency in the procurement of insurance.

In the English Court of Appeals, Lord Esher, M. R., in one part of his opinion said: "In order to determine whether any true principal of insurance law will make the defendant liable in the present case, we must see what circumstances have been held to have that effect. Then we shall see whether any of those principles are applicable to the circumstances of the present case.

Sir Joseph Arnould says in his work on marine insurance (5th ed. 514) that the principle is now firmly established that the mis-

¹ Smith v. Home Ins. Co. (1888) 47 Hun. 30.

² Crook v. Phoenix Ins. Co. (1890) 38 Mo. App. 562.

Western Ass. Co. v. Stoddart (1899) 88 Ala. 606.

representation from mistake, ignorance, or accident, of any material fact, however innocently made, will avoid the policy quite as much as in cases where such misrepresentation arises from a wilful intention to deceive ; and in another place (545] "Concealment, in the law of insurance, is the suppression of a material fact, within the knowledge of one of the parties which the other has not the means of knowing or is not presumed to know. Whether such suppression of the truth arise from the fraud of the assured (that is from a wilful intention to deceive for his own benefit), or merely from mistake, negligence, or accident, the consequences will be the same."

The substantial proof of these propositions is not disputed by any one. They are a statement of the circumstances which will prevent the enforcement of the contract, but they do not contain the principle whereby such circumstances produce such an effect. As to this, Sir Joseph Arnould says : "The doctrine of the English courts is that in the case supposed, although no pretext exist for anything like actual fraud, yet the policy is to be considered void on the ground of constructive or legal fraud."

This is directly in contradiction of what has been said in the former part of this judgment. Duer, however, as is well known, does not adopt this principle but holds that it is a part of the contract that full disclosure shall be made, as well as every representation shall be accurate. But, if this be correct, the contract should never be set aside or treated as void on the ground of concealment ; the contract should stand and be treated as broken by the assured. This view would raise new complications which have never yet been urged.

Phillips, who is considered the more accurate guide, thus treats the matter of principle :¹ "The effect of a misrepresentation or concealment in discharging the underwriters does not seem to be merely on the ground of fraud, as has been usually laid down by writers on insurance, but also on the ground of a condition implied by the fact of entering into the contract that there is no misrepresentation or concealment." Duer criticizes the phraseology of the books in putting the effect of a misrepresentation or concealment upon the contract entirely upon the ground of fraud. Arnould adheres to this application of that term for

¹ Phillips (3rd ed.) 287, cap. VII § 1 par. 537.

the sake of consistency with the general legal doctrine that what passes between the parties preliminary to a contract is not part of it, and should not be imported into it. And since a representation through mistake or inadvertence has the same effect in reference to the underwriter, as an intentional and literally fraudulent misrepresentation or concealment, namely, it induces him to enter into a contract which he would have otherwise declined or to take a less premium than he would otherwise have demanded, he deemed it to be excusable to apply the term "fraud" and thus bring the doctrine on this subject nominally within the acknowledged general principle applicable to other contracts.

But I cannot think that this anomalous use of the term is justifiable on this ground, since ambiguous phraseology is not to be tolerated in any science, least of all in that of law, where it can possibly be avoided, as it may easily be in this case, by stating the practical doctrine in direct terms, namely, that it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake. He says lower down : "The forfeiture of the insurance by misrepresentation or concealment is a forfeiture by a breach of the condition of the contract. So it seems to have been considered by Chancellor Kent." This seems to me to be the true doctrine. The freedom from misrepresentation or concealment is a condition precedent to the right of the assured to insist on the performance of the contract, so that on a failure of the performance of the condition the assured cannot enforce the contract."¹

Lindley, L. J., and Lopes, L. J., sitting with Lord Esher, M. R., in the English Court of Appeals, sustained the appeal holding that the concealment of the material facts within his knowledge by the broker, under the circumstances prevented the insurance policy ever attaching. The Master of the Rolls placed his decision upon the ground that this agent to effect the insurance was not an agent as in the cases he reviewed, who was under any legal obligation to inform his principal as to the matters communicated to him connected with the vessel insured. His associates reviewed the same cases.

The conclusion of Lindley, L. J., was as follows : "It appears to me to be established by the cases to which I have referred that,

¹ Blackburn, *Low & Co. v. Vigers* (1886) 55 L. J. 347.

in order to prevent fraud and wilful ignorance on the part of persons effecting insurance, no policy can be enforced by an assured who has been deliberately kept in ignorance of material facts by some one whose moral if not legal duty it was to inform him of them, and who has been kept in such ignorance purposely in order that he might be able to effect the insurance without disclosing those facts. The person who allows the assured to effect a policy under such circumstances as I am now supposing does not act fairly to the underwriters and although such person may owe them no legal duty, the assured cannot in fairness hold the underwriters to the contract into which they have in fact entered under these circumstances.

The assured may himself be perfectly innocent when he effects the insurance, but as soon as he is informed of the facts it ceases to be right on his part to take advantage of the concealment without which that insurance would not have been effected. In other words, the assured cannot take advantage of the ignorance in which he has been improperly kept by one who ought to have told him the truth. If it was the legal duty of the person who has so kept him in ignorance to inform him of the facts concealed, it is, I think, clearly settled that he cannot avail himself of his own personal ignorance of them. But if there is no such legal duty on him, the same consequence appears to me to follow if there was a moral duty to tell him the truth. He may exclude all legal duty to be informed of what has occurred by giving instructions dispensing with information and such instructions may be given for reasons which exclude all inference of fraudulent intent on his part. But in such a case it appears to me that he cannot enforce a contract of insurance obtained by such unfair means as those proposed. In my opinion Duer and Phillips are both right in contending that fraud on the part of the assured is not essential to discharge the underwriters on the ground of misrepresentation or concealment. It is a condition of the contract that there is no misrepresentation or concealment either by the assured or by any one who ought as a matter of business and fair dealing to have stated or disclosed the facts to him or to the underwriters for him."

The action upon this policy with a different defendant seems to have been afterwards before the same trial judge as before and a special jury, in which upon the same facts the judge having submitted the question to the jury whether the final effecting of

the insurance was but a continuation of the original application of the broker first employed by the insured and in fact an effecting the insurance by him, the jury found that it was, whereupon the judge directed a verdict and judgment for the insurers.

There was a motion before the full bench to set aside this verdict and judgment and an entry of judgment for the insured, or an order for the new trial, upon the ground that the judge should have directed the jury that the original brokers were not the agents of the insured to effect the insurance and that the noncommunication of material information within their knowledge, but not known to the insured or their final brokers, was not a concealment which would affect the policy, and should have directed a verdict for the insured upon the facts. The motion was dismissed.

These were the facts: A firm of underwriters instructed Glasgow brokers to effect a re-insurance on an overdue ship. The Glasgow brokers thereupon telegraphed to their London agents to insure at the rate named by the underwriters. The London agents replied, stating the market rate. Meantime the Glasgow brokers received information of the loss of the vessel and without communicating this to the underwriters or the London agents telegraphed to the London agents in the underwriter's name to insure at the market rate. Subsequent negotiations were carried on directly between the underwriters and the London firm, who effected a re-insurance at a higher rate than that originally named by the underwriters. The full bench upon the finding that from these facts the insurance was effected through the Glasgow agents and they having concealed their information held that there could be no recovery on the policy.

In support of the finding by the jury, Pollock, B., in one place said: "In the present case the name of the vessel, the amount to be insured and the whole object of the bargaining was the same and the only change was in the advanced premium so that the underwriters not merely continued a negotiation begun by their agents, but they availed themselves of it by using and adopting what they had done up to a certain point. It is truly said, no doubt, that when once the agents ceased to negotiate their authority was at an end; but this leaves untouched the position that the negotiation was handed over to the principal to complete and that the London brokers were entitled to treat the matter as one entire transaction."¹

¹ Blackburn, *Low & Co. v. Haslam* (1888) 57 L. J. 479.

Bowen, L. J., laid down the rule as follows : " It is established law that a person dealing with underwriters must disclose to them all the material facts which are known to himself and not to them, or, at all events, all facts which they are not bound to know. What are material facts has been defined by authority. It is the duty of the assured to communicate all facts within his knowledge which would affect the mind of the underwriter at the time the policy is made, either as to taking the contract of insurance or as to the premium on which he would take it. The materiality of the fact depends upon whether or not a prudent underwriter would take the fact into consideration in estimating the premium or in underwriting the policy." ¹

284. American views upon concealment.—Concealment is the suppression of material facts having reference to a pending insurance, known to the applicant, but not known to the insurer. Such concealment, through ignorance or design will, if material, avoid the policy.²

The law imposes upon the insured as a preliminary duty, in the nature of a condition—precedent, the disclosure of all material facts known to him connected with the risk. The test of materiality is in the enhancement of the premium, had the true facts in the case been given ; as when the nature of the subject of insurance, if known, might influence the insurer to decline the risk, or to write upon it only at an advanced rate of premium, it would be deemed material to the risk. Whatever the form of expression used by the insured, if it have the effect of imposing upon or misleading the insurer, it will be held to be material, and upon due proof avoid the policy. Or, if a fact usually immaterial be enquired about specifically, it will be considered material. But a disclosure waived is an admission of immateriality.³

284a. Concealment as to diseases—Untrue answers made in good faith.—Knowledge of agent.—In a case where the application provided that the policy should be rendered null and void by reason of any " untrue or fraudulent answers," and in the policy it was stated that the result would be the same if in any respect the answers were " false or fraudulent," the application and the policy together constituted the contract. The applicant for insurance on

¹ Tate v. Hyslop (1885) 15 Q. B. D. 368.

² Griswold, 145.

³ Griswold, 405.

his life had answered negatively all the questions pertinent to his previous state of health, as to what diseases he might have had, attendance of physicians, etc.

It developed on the trial of an action on this policy that the insured had had some serious diseases previous to his application, and the effect of his answers to the company was brought before the court. The contention of the beneficiary was that, if false, they were not intentionally so, and the avoiding of the policy was thereby prevented.

The Court of Appeal of New York, however, held, that the statements made in the application were made warranties, and if untrue, they avoided the policy, although made in good faith and with a belief of their truth; that the word "false" in the policy was used in the sense of "untrue," and did not limit the effect of the warranty to a statement intentionally untrue; also that any knowledge of the agent of the company who procured the insurance, at the time the application was made, of the true state of facts did not alter or affect the contract.¹

284b. Concealment of a release.—The rule in marine insurance requires communication to the insurer of any information the applicant has which may be material to the risk. And the New York Court of Appeals has held the same rule applicable in a fire insurance case.²

While this may be the doctrine relating to the contracts of re-insurance it is not to the same extent applicable to those of original insurance against loss by fire. In the latter it is usual, by the application or by the condition of the policy, to expressly call upon or require the assured to make disclosures; and so far as he acts in good faith, he is required only to correctly comply with the terms so prescribed.³

In a loss by fire occurring to cotton stored in a warehouse, built upon ground adjacent to a railroad leased from the company and, where as part of the lease, a release to the railroad company of all liability it might incur by reason of a fire being caused by sparks from its locomotives had been given:—

The insurers defended on the ground that it was material to them to have a knowledge of this release as affecting their right of

¹ *Foot v. Aetna Life Ins. Co.* (1875) 61 N. Y. 571.

² *N. Y. Bowery Fire Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. 359.

³ *Beach*, 445.

subrogation to the rights of the insured as against the railroad company in case the loss was caused by fire communicated from its locomotives.

On a motion for a new trial the United States Circuit Court held that the question, whether the omission to make known the existence of such release invalidated the insurance policy on the property, depended upon whether such release was a material fact in the contract of insurance, which was a question for the jury, and that the instruction of the district judge that if the insurers in the territory in question made no difference in rate, with right of subrogation or without it, or if they found that there was neither usage or custom showing the materiality of the right of subrogation among insurers in their acceptance or refusal of risks, they might find that the failure to mention the fact of the release of the railroad company where the application was verbal, was not a concealment of a material fact which would invalidate the policy, was a proper instruction.¹

284c. Concealment of financial embarrassment.—False statement by agent.—In an action upon an accident policy where the assured had been drowned, Jenkins, J., discussed the question of non-disclosure of financial embarrassment by the assured in his application as follows :

“It cannot be said that the assured was a party to the fraud, if fraud there was upon the insurer. Assuming, as found by the jury, that his death was accidental and that the insurance was otherwise effected in good faith, the mere fact of non-disclosure of his embarrassments was not wrongful. He was not inquired of upon that subject. Silence under such circumstances was not fraudulent. Most men engaged in large enterprises meet with financial embarrassments and their incomes are fluctuating. If no false statement is made, inducing insurance which could not otherwise be obtained, there exists no obligation to disclose one's financial condition. If the information be deemed essential it should be insisted upon, not waived, and the assured should not be persuaded to silence by the active negligence or fraud of the agent of the assurer.”²

As to the principle which is the basis of this rule the judgment

¹ *Pelzer Manufac. Co. v. St. Paul F. & M. Ins. Co.*, (1890) 41 Fed. Rep. 271.

² *Sawyer v. Equit. Acc. Ins. Co.*, (1890) 42 Fed. Rep. 30.

proceeded : "The insured was not asked as to his income, but after he had signed the application the statements in which were warranted, the agent, without his knowledge, inserted a statement that it was not less than a hundred dollars a week. This statement was in a different handwriting from the rest of the application and the policy was issued by the home office. The company defended on the ground that this was a false statement."

Jenkins, J., after harmonizing the various decisions bearing upon the question as rendered by the Supreme Court of the United States held the company liable, although the insured was practically insolvent, and his income much less than stated in the application. He thus disposed of the insurer's contentions : "It is clear that the defence of breach of warranty, on the ground of false statement of income, must fail for the plain reason that the assured executed no such warranty. The paper signed was a blank as to that subject. The filling of that blank was subsequent to the signing and was the act of the agent of the company, and without authority of the assured. He cannot be bound upon a warranty of which he was ignorant. Nor does the case fall within the rule applicable to negotiable and other instruments executed in blank and entrusted to the custody of another for use for the benefit of the signer or others, that, as between such party and innocent third parties, the person to whom the document is entrusted, is deemed the agent of the party to fill the blanks necessary to perfect the instrument and this for two sufficient reasons: The application was written by the agent, who was apparently clothed with authority to do all acts needful in the premises. He propounded the questions which he deemed proper and received and noted the answers thereto. He made no enquiries touching the income of the assured nor was any statement demanded upon the subject ; in all this he acted for the company and was *pro hac vice*, the corporation. His silence as to the question was equivalent to an assertion to the assured that the question was not material and was waived. Under such circumstances the signing of the application with the blank unfilled cannot be claimed as an authority to the agent to fill the blank. The rule applies to instruments entrusted to one who represents the signer, and is thereby clothed with power to impose upon innocent third parties. But here the instrument was delivered to the agent of the company. In such case the assured is not estopped to deny the warranty. The company may, in fact,

have relied upon the statements filed in the blank by its agent : but that is unavailing, because to work an estoppel the misconception as to the state of facts must have been induced and the company must have been misled by the words or conduct of the assured, but here the imposition was the act of its own agent, enabled by its authority and not by the act or conduct of the assured, to work imposition. His acts with respect to the preparation and receipt of the application must be deemed the acts of the company. The principal should, therefore, bear the consequences of the conduct of a negligent or fraudulent agent intervening between the assurer and the assured, the latter being guiltless of fraud or collusion, and this upon the familiar principle that, when one of two innocent persons must suffer by the fraud or negligence or unauthorised act of a third, he who clothed the third with power to deceive or injure must suffer the loss.”¹

284d. California statute as to concealment—Concealment of rumor of vessel being lost.—The Civil Code of California provides (2561) that “a neglect to communicate that which a party knows and ought to communicate is a concealment ;” (2562) “a concealment whether intentional or unintentional entitles the injured party to rescind a contract of insurance ;” (2563) “each party to a contract of insurance must communicate to the other in good faith all facts within his knowledge and which are, or which he believes to be, material to the contract, and which the other had not the means of ascertaining and as to which he makes no warranty.”

The owner of a cargo of wheat loaded on a barge which was overdue held a conversation with the consignee of the barge, in which he was told that a barge had been lost, and that if he was not insured he “had better get insured pretty quick.” He applied at once to the manager of an insurance company for insurance on the cargo of wheat, but did not inform him of this rumor. Afterwards when he knew the barge was the one lost, he then stated what he had been told previously to his application. The manager gave him notice of a rescission of the contract.

There was a verdict for the company in an action upon the policy, the defence being a concealment on the part of the applicant of material facts. The Supreme Court of California sustained this

¹ *Sawyer v. Equitable Acc. Ins. Co.*, (1890) 42 Fed. Rep. 30, cited *supra* § 284c.

verdict saying: "The conviction is irresistible that the insured feared his wheat was lost, hoped to get out a policy before the loss was known and did not deal fairly with the insurer, because he did not place the insurance company in a situation such as he occupied, to know all the necessary facts and circumstances believed by the insured to be material attending the non-arrival of the barge."¹

285. Vacancy—Notice to agent.—The insured cannot recover upon a policy which contains a condition making the contract void, if the premises be left unoccupied for more than 15 days without notice to the company, and it appears that the premises were vacant at the time of the fire, and had been so for a much longer period than 15 days, without notice having been given to the company.²

But where the policy provided that the contract would be null if the house was left vacant without the consent of the company endorsed in writing on the policy, it was held nevertheless that notice to the company's local agent before the policy was issued was sufficient and the policy was really issued on a vacant house, though it read differently.³

285a. Vacancy—Knowledge of manager of company.—On the argument of the appeal the defendants for the first time set up that by the application the plaintiff had described the building insured as occupied by himself and his tenants as a dwelling house, thereby contracting with the defendants that it was so occupied, whereas, in fact, it was then vacant, and that there being thus an entire misdescription of the subject matter of the insurance, the risk never attached.

On the pleadings and at the trial this misdescription was relied upon merely as being a material misdescription avoiding the policy under the first statutory condition. This issue was found in favor of the plaintiff, it being proved that the policy had been issued in substitution of a former policy in the defendant company, the risk on which they had continued after accepting notice that the building had become vacant, and the application for the sub-

¹ Hart v. British & For. Mar. Ins. Co., (1889) 80 Cal. 440.

² Cardinal v. Dom. Fire & Mar. Ins. Co., 3 L.N. 367.

³ Agricultural Ins. Co. of Watertown and Ansley, 17 R.L. 108 Q.B.

stituted policy had been filled up by their general manager, to whom the plaintiff had given all the information he asked for, and had told him that the building was then unoccupied.

The court was of opinion that the knowledge of their general manager was the knowledge of the company; that the misdescription was immaterial, and that the defendants could not be permitted at that stage of the cause to shift their ground and set it up as a warranty or part of the contract.¹

285b. Vacancy—Loss paid to loan company—Subsequent mortgages—Assignment of mortgage.—The defendants insured seven houses belonging to the plaintiff and which had been mortgaged by him to a loan company and which were described in the policy as “a two-storey frame, rough cast, felt roofed block, * * * containing seven dwellings, six of which are occupied by tenants, and one by assured.” In the application, filled up by defendants’ agent, the question, as to how many tenants, was answered “six tenants and applicant,” the agent informing defendants that “the largest house of the lot the applicant will occupy himself.” A variation of the statutory conditions was printed on the policy in these words: “This policy will not cover vacant or unoccupied buildings (unless insured as such), and if the premises shall become vacant or unoccupied, * * * this policy shall cease and be void unless the company shall by endorsement * * * allow the insurance to be continued.”

A fire occurred by which the houses were destroyed, and defendants paid the loan company the amount of their mortgage, under a prior general agreement with them by which the policy was to be treated between the parties to the agreement as unconditional except as to the mortgagor, and whereby the defendants were entitled, upon payment to the loan company under the policy or otherwise of any loss as to which they claimed to have a defence against the mortgagor, to be subrogated to the loan company’s rights and to have the mortgage assigned to them. For some months prior to the fire several of the houses became and remained vacant, of which the plaintiff was aware, but of which he did not notify defendants. In an action by plaintiff upon the policy, it was decided that the actual facts as to occupancy being before

¹ *Reddick v. Saugeen Mutual Fire Ins. Co.*, 15 A.R. 363, referred to *supra* §§ 247, 249, 258, 262 and *infra* 285b.

them at the time of the application, the defendants were liable, nor were they relieved by their variation of the statutory conditions that the policy would not cover vacant or unoccupied houses.

And, also, that the variation as to the premises becoming vacant or unoccupied where, as here, the houses were of a class likely to be occupied by tenants for short periods, was unreasonable, and the reasonableness of the variation was to be tested with relation to the circumstances at the time the policy was issued.

Smith v. The City of London Insurance Company, 14 A.R. 328, and *Ballagh v. The Royal Mutual Fire Insurance Company*, 5 A. R. 87, were specially referred to :—

But it was said that the fact that several of the houses were vacant to plaintiff's knowledge for some months before the fire, was, under the third statutory condition, a change material to the risk, which was thereby increased, and the failure to notify the defendants avoided the policy "as to the part affected," which in this case was the whole block :—

And, also, that the meaning of the word "risk" in the third statutory condition is not distinguishable from the same word in the first statutory condition, and that subsequent mortgages executed by plaintiff were matters relating to title, and were not covered.

Reddick v. The Saugeen Mutual Fire Ins. Co., 14 O.R. 506, *supra* § 285a, was followed :—

And, lastly, that although defendants had paid the mortgages and taken an assignment of one of them, they could not hold it against the plaintiff.

Imperial Fire Ins. Co. v. Bull, 18 S.C.R. 697, was followed.¹

286. American decisions on vacancy—New Hampshire ruling.—The New Hampshire Supreme Court has said : "The meaning of the words 'vacant or unoccupied' as used in the contract of insurance is that which the parties intended to give them, and that intention is to be found from the whole instrument, the subject matter of the contract, and the situation of the property insured. The object of the stipulation against vacancy and non-occupancy was to guard against the increased risk which arises from the absence of everybody whose duty or interest might afford

¹ *McKay v. The Norwich Union Fire Ins. Co.*, 27 O. R. 251.

some protection. In the same clause of the contract, 'increase of risk from the mode of occupation and use of the premises,' and 'increase of risk by any means whatever,' are mentioned as express grounds for avoiding the policy. 'If the buildings shall be occupied or used so as to increase the risk, or become vacant and unoccupied for a period of more than ten days, or the risk be increased by any means whatever,' is a statement in which the leading idea in the condition of forfeiture is 'increase of risk' and that idea must have been intended as a part of the definition of the words 'vacant and unoccupied.'

It was the increase of risk from the loss of care and attention of persons otherwise present which the parties intended to guard against by the stipulation of forfeiture in case of vacancy and non-occupancy for more than ten days. They intended by the words 'vacant and unoccupied' as used in the policy and in the connection in which they were used, such a desertion of the premises and removal from them as would materially increase the risk." Further on they said: "The question of vacancy and non-occupancy, and the question of increase of risk from these and other changes of circumstances, are questions of fact for the jury." But where the undisputed facts, as naturally interpreted, show vacancy and non-occupancy and consequent increase of risk, or where there is no evidence to rebut, modify or explain the evidence of increased risk from the change, there is no question of fact to submit to the jury, and it seems to be the duty of the court to declare direct the verdict."¹

236a. Nebraska ruling.—The Nebraska Supreme Court has held in a case before it, that a mere temporary absence of the occupant of a building therefrom will not render void a policy of insurance which contains a provision that the policy shall become void in case the building becomes vacant.²

237. Statements as to belief, expectation or intention—Promissory representations.—An expression of the belief, expectation, or intention of the insured, is not a representation that the fact or thing believed, expected or intended, either actually exists or will certainly occur, but it refers solely to his mental condition

¹ Moore v. Phoenix Fire Ins. Co. (1886), 64 N.H. 140, 142, 143. ² *Idem*.

³ Springfield F. & M. Ins. Co. v. McLimans, 1890, 28 Neb. 846.

at the time it was made, and will not affect the policy, unless the purpose of making it was to deceive the insurer.¹

287a. Expected occupancy of a house.—In the case of *Kimball v. Ætna Ins. Co.*² the policy was issued on a dwelling house in consequence of a promise that it would be occupied. A condition of the policy was that, “if in any written or verbal application for insurance the assured makes an erroneous representation, materially increasing the risk, the company is not to be liable.” The insured had said: “The house would be occupied; that he had a man in view who was going to occupy it.” The promise was not carried out, the house remaining empty.

It was held, that failure to carry out promise, (no fraud being proved) did not avoid the policy, though the risk was increased. This case has been controverted and criticized, but is considered well founded, and supported by judgments in England and the United States. At the worst, all that could be said against the plaintiff was, that he was bound to occupy in a reasonable time.³

287b. Oral promissory representation honestly made.—Oral representation as to a future fact honestly made can have no effect. It is a mere statement of an expectation; subsequent disappointment will not prove it untrue.⁴

287c. Date of sailing.—Judge Mackay points out that *Dennistoun v. Lillie* is the strongest case showing that an oral representation promissory may be set up to defeat a written policy, but examination will show that the representation in this case was in no sense promissory, or relating to anything after execution of the policy. The representation was an untrue statement of a past fact. The vessel had sailed 23rd April and yet it was represented that she was to sail at 1st May, a future date. She was lost shortly after the date at which she was stated as to sail.”⁵

287d. Validity of promissory representations questioned.—It has been contended by an able jurist that there is no such thing as promissory representation.⁶

¹ *Catlin v. Springfield F. Ins. Co.*, 1 Sumner, 434; *Bryant v. Ocean Ins. Co.*, 22 Pick. 200.

² Duer, sec. xiv., cited in 13 L.N. 350.

³ 13 L. N. 350, and see 3 Kent Comm. 284, but see Arnould 509.

⁴ 13 L. N. 350. ⁵ *Ib.*

⁶ See opinion of Chancellor Walworth in *Alston v. Mechanics' Mut. Ins. Co.*, 4 Hill 329.

This learned judge insists that any agreement on the part of the insured in regard to the future must, in order to bind him, be expressed in the policy, and, unless it is so expressed, any allegation and proof of it as a defence on the part of the insurer will be a direct violation of the rule that extrinsic evidence is inadmissible to vary or control a written contract, and consequently should not be permitted. Though he admits that the case is different with a representation of an existing fact, his argument necessarily bases the effect of such a representation in invalidating the policy simply upon its untruth at the time it is made, and therefore holds that it is of no force, so far as regards any implied stipulation that the fact represented shall continue to exist during the whole period of the risk.

Thus, where one represents his building as occupied for a certain specified purpose, the result of the Chancellor's argument is that if these facts are not true at the time the representation is made, then the policy is void, but if, on the next day or week after the policy is issued, the house is permanently put to a more hazardous use, it will constitute no defence for the insurer to an action on the policy.

But this conclusion is opposed to the invariable tenor of the decisions both in England and this country, such representations having been always construed to be representations, not only that the fact exists but also that it will continue to exist throughout the duration of the risk, so far as this depends upon the insured. The opinion of the Chancellor even in regard to representations purely and solely promissory is not supported by the decisions.¹

Duer has ably reviewed the position taken in *Alston v. Mechanics' Mut. Ins. Co.* and has shown its error, as well as that of *Bryant v. Ocean Ins. Co.*, which supports the opinion of Chancellor Walworth, and he has plainly demonstrated by an analysis of the various decisions on the subject, that promissory representations have been from the first recognized by the courts, and that a substantial compliance with them is necessary to the validity of the policy.²

It must, however, be admitted that the settled law in regard to the effect of misrepresentation without fraud upon the policy as

¹ *Edwards v. Footner*, 1 Camp. 530 and see 13 L. N. 356.

² See Duer on Ins., Lect. 14, note 6.

laid down in the cases above cited, and denied in *Alston v. Mechanics' Mut. Ins. Co.*, is a departure from the rule in reference to the admissibility of parol or extrinsic evidence. It is plain that the insurer is permitted to show by proof of an agreement extrinsic to and independent of the policy, that the contract is not such as the terms of the policy, taken by itself, would imply. Duer and Arnould agree that this salutary rule of evidence has been in a measure violated; and while they consider the law as too well settled, both in the United States and in England, to be shaken, they still express a decided preference for the doctrine prevalent on the continent of Europe, which requires the insertion in the policy of all material facts, which however are not to be construed as warranties, unless an intention to that effect is expressly and unequivocally declared.

Judge Mackay is of opinion that extrinsic evidence is not admissible.¹

287e. Promissory representation as to a watchman.—In the questions and answers before a policy “watchman to be kept at all times,” &c. was promised. The sheriff seized the mill and locked it up, and the day after it was burned. So the warranty about the watchman was not kept. The court held the sheriff's seizure to be no excuse.² The Court of Appeal of Ontario seem to hold that this is not a warranty for a continuance of employment of a watchman.³

A continuous practice to keep is not warranted here; it is a mere statement of a fact then existing.⁴

287f. Answers true to the best of applicant's knowledge and belief.—An application for a life insurance policy contained the following declaration after the applicant's answers to the questions submitted:—“I (the person whose life is to be insured) do hereby warrant and guarantee that the answers given to the above questions (all which questions I hereby declare that I have read or heard read) are true, to the best of my knowledge and belief, and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and I further agree

¹ 13 L. N. 356.

² *First National Bank of Ballston Spa v. Ins. Co. of N. A.*, 7 Albany Law J. 187.

³ *Worswick v. Canada Fire and Mar. Ins. Co.*, 3 A.R. 487 (1879).

⁴ *Grant v. Ætna Ins. Co.*

that any mis-statements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all payments made thereon. It is also further agreed that should a policy be executed under this application, the same shall not be delivered or binding on the association until the first premium thereon shall be paid to a duly authorized agent of the association, during my lifetime and good health. I (the party in whose favor the insurance is granted) do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said association."

The Court agreed with the judgment of the court below, that this was not a warranty of the absolute truth of the answers of the applicant, but that the whole declaration was qualified by the words "to the best of my knowledge and belief."

At the trial the jury were charged that, if there was wilful misrepresentation, or such as to mislead the company, they should find for the defendants, but that if the answers were reasonably fair and truthful to the best of the knowledge and belief of the applicant, their verdict should be for the plaintiffs.

It was decided to be a proper direction.¹

Where the application contained a number of questions and answers, and at the foot was a declaration signed by the assured, that to the best of his knowledge and belief the foregoing statements and other particulars were true; that the declaration should form the basis of the contract, and that if any untrue averment had been intentionally made therein or in replies to the company's medical adviser in connection therewith, the policy should be void. By the policy the declaration and "relative papers" were made the basis of the contract, with the proviso that if any fraudulent or wilfully untrue material allegation was contained in said declaration; or if it should thereafter appear that any material information had been withheld and any of the matters set forth had not been truly and fairly stated, then the policy should be void.

To the questions in the application as to the name and residence of the usual medical attendant, and for what serious illness had he attended, the assured answered "none," and to the ques-

¹ Supreme Ct. of Canada, *Confederation Life Ass. v. Miller*, 14 S.C.R. 330, see *infra* page 443.

tion by the medical adviser as to what other disease or personal injury, and from whom had he received professional assistance, etc., the assured answered "none." It was found that these answers were wilfully untrue and that the information was wilfully withheld from and was material to be stated to the company.

The court held, that these answers constituted breach of express contract between the parties and therefore the policy was void.¹

In this case the pleas setting up the above defences were added at the trial, and after the case had been in progress for some time. The action was commenced before the Ontario Judicial Act came in force, but the trial took place thereafter.

It was held, that whether under sec. 8 of the Administration of Justice Act, or under Rule 128 of the Ontario Judicature Act, the pleas were properly added.

A replication to these pleas set up that certain correspondence between the company's General Manager and their local agent, but of which the assured had no notice, directing the agent to make enquiries as to habits, etc., of the assured, upon the result of which the agent was to issue the policy, constituted an agreement that the company would rely on the judgment of the agent alone founded on such enquiries.

It was held, the replication could not be supported either at law or on the facts.

Per Wilson, C. J. : Where the materiality of certain enquiries is obvious and is assumed at the trial, as *e.g.* with regard to the temperate habits or otherwise of the deceased, there is no need to submit it to the jury. The manager of the defendant company entertaining doubts as to the propriety of accepting A. R.'s application for a risk on his life, caused the local agent of the company to make further enquiries as to A. R.'s habits, etc. On receiving a satisfactory report from the agent a policy was issued.

It was held, the defendants were not thereby precluded from relying upon the written application of A. R., and showing that it contained wilfully untrue statements, the effect of which was by the express stipulations thereof sufficient to avoid the policy.²

In a case above, at the end of questions in an application for insurance, made in December, 1883, and forming part of the appli-

¹ Russell v. Canada Life Ass. Co., 32 C.P. 256, C.P.D.

² *Ib.* and 8 A.R. 716.

cation, was an agreement signed by insured stating that he warranted and guaranteed that the answers to the said questions were true to the best of his knowledge and belief, and he also agreed that the application should be the basis of his contract, and that any misstatement or suppression of facts in the answers to said questions, or in his answers to the medical examiner, should render the policy null and void. The proposals and declarations were also made the basis of the contract. Endorsed on said application were answers given to questions by a medical examiner, and at the end thereof a certificate, signed by insured, stating that he had made full, true and complete answers to the questions propounded by said examiner, and agreed to accept the policy on the terms mentioned in the application.

In answer to a question whether he had had any serious illness, local disease, or personal injury, and if so of what nature, insured answered, "No, except a broken leg in childhood." There was an answer to a question giving one T.'s name as that of his usual medical attendant, and in answer to another question, whether he had consulted any other medical man, and if so for what and when, insured replied "Dr. A. for a cold." Insured had been thrown from a load of hay, and on his examination in a suit for damages against the municipality, he swore he had been five weeks in bed suffering from his chest and was at the time unfit for work of any kind, and had been attended by three doctors. No mention was made of this accident or of the doctors.

In reply to a question whether his grand-parents, etc., brothers, etc., ever had pulmonary or other constitutional disease, he replied, "No"; and he also stated, in reply to questions as to what disease his brother had died from, that he had died from overgrowth. It was shown that an elder brother had been treated by Dr. A. some years before for pulmonary affection and that insured had said that the brother, who died, had bled at the lungs and had been ill for some months before he died. Insured, also, in answer to a question whether any material fact bearing on his physical condition or family history had been omitted replied "No." Defendants admitted policy, proofs of death, probate, etc., and accepted burden of proof at the trial, and claimed the right to begin, which was refused.

On motion in term, copies of letters and documents, signed by the insured, sent to the government for leave to remain off a

homestead in the North-West and showing that he had been suffering from congestion of the lungs and illness, from the spring of 1883 to the spring of 1884 were produced. It was shown that the existence of some such documents had been suspected and that they had been searched for in the government offices but could not be found, and that defendant received them the day after the trial.

It was held, that plaintiffs had the right to begin notwithstanding such admissions. Wilson, C. J., reserved the consideration of the admission of the new evidence. Per Armour, J. : It could not be received, as it was merely corroboration and its suspected existence would have been ground for asking to have the trial postponed. Per Wilson, C. J. : There should be a new trial. There was evidence to go to the jury as to the truth of answer given respecting the health of the deceased brother. The jury should have been asked to say whether the answer as to enquiry was a misrepresentation in fact. That the certificate meant the answers were given upon a knowledge of the facts and upon insured's belief in the truth of those facts, and a statement made without knowledge would not be protected by the formula "best of knowledge and belief," if insured had no knowledge, nor would such statements be protected if made regardless of the insured's belief in the truth of such knowledge as he had. The proposal was a warranty that the answers were true according to the best of his knowledge. Per Armour, J. : The direction to the jury, whether insured had stated to the best of his knowledge and belief the truth in regard to deceased brother, was sufficient. As to the accident it was one which ought to have been mentioned, but it was properly considered of too little importance by insured or else had escaped his memory at the time of the application, and it was sufficient for the jury to have found insured did not wilfully withhold the fact, but answered to the best of his knowledge and belief; and the proposals were not warranties. The court being equally divided in this case the motion for a new trial was dismissed with costs.¹

It is held that where misrepresentations contained in the application are to the knowledge of the assured, such nullity may be invoked by the insurer without any return of premiums paid.²

¹ *Miller v. Confederation Life Ass. Co.*, 11 O. R. 120, Q. B. D. affirmed 14 A.R. 218. 14 S. C. R. 330. See *supra* pages 439, 440.

² *New York Life Ins. Co. v. Parent*, 3 Q. L. R. 163, referred to *infra* § 305, and *N. Y. Life Ins. Co. v. Talbot*, 3 Q. L. R. 168. C. C. L. C. 2501.

In a recent and leading case heard before the House of Lords, on an appeal from the Scottish Court of Sessions, the declaration appended to the answers of the insured connected with the proposal for insurance was to the effect that the foregoing were true, and that the assured agreed that this declaration should be the basis of the contract, and that if any untrue averment, etc., was made, the policy was to be absolutely void, and all moneys received for premiums should be forfeited. The policy recited this declaration as the basis of the contract.

Among the questions asked the proposer were: "Are you temperate in your habits?" and "Have you always been so?" He answered to the first, "Temperate." To the second, "Yes." The payment of the policy upon his death was refused on the ground that these answers were false and avoided the policy.

The House of Lords reversed the Scottish Court of Appeal, and held that the declaration taken in connection with the policy constituted an express warranty that the answers to these questions were true and, the evidence showing that they were untrue, the policy was absolutely null and void.¹

Lord Fitzgerald, in this case before the House of Lords, gave this definition: "Temperate in habits" is a sentence to be interpreted, and, though not to be taken in the Pythagorean sense of "total abstinence," yet seems to import abstemiousness, or at least moderation, the rule of 'not too much' by temperance taught.²

Where the words in the contract bind the applicant to make complete and true answers to all questions asked him, even if these questions are immaterial to the risk, the company is entitled to a truthful answer, and any untrue statement would vitiate the policy.³

Shipman, J., in a case involving the question whether or not an applicant for membership in a benevolent order warranted the truth of an answer to the question, "Have you been rejected by the medical examiner of any lodge or society?" gave it as his opinion that the applicant was required, under the contract, to answer the question according to his knowledge or reasonable means of belief, and not to misrepresent or suppress known facts, but that he did not warrant the absolute truth of his answers.⁴

¹ Thomson v. Weems (1884), 9 App. Cas. (H. of L.) 671, and see Life Association of Scotland v. Foster, 11 Ct. Sess. Cas. (3rd series) 351.

² Thomson v. Weems, *supra* note 1.

³ McCollum v. Mut. Life Ins. Co. 1889, 55 Hun. 103.

⁴ Semm v. Supreme Lodge K. of H. (1887), 29 Fed. Rep. 895.

In an application the assured certified "that the answers made by me, etc., are true, in which there are no misrepresentations or suppression of known facts," admitting that such statements were a warranty. In a subsequent paragraph occurred the words: "The above questions are answered to my best knowledge and belief." The New Jersey Supreme Court treated the language as ambiguous and adopted the rule of construction usual in such cases, and held that the insured warranted the answers to be true only to the best of his knowledge and that an untrue statement that would avoid the policy in such a case meant one designedly untrue.¹

In a proposal, as the application is styled in English cases, the residence of the proposer was stated to be at a certain number upon a certain street in an English city. In an action on the policy the insured defended on the ground that this was a false answer; that the proposer actually lived in Ireland, and that it vitiated the policy. The court held that as it appeared that the assured filled up the space after "residence" in the proposal with the address where he was then residing, and where he was going to reside for the next three months, the answer was true; for in the opinion of the court "residence" in the proposal meant the place where the proposer was living or residing at the time of making the proposal, and not where he had been residing before, or where he was going to reside afterwards.²

The English House of Lords, on an appeal, has held that an answer "no" by one of a firm for the firm in a proposal for fire insurance, to the question, "Has proponent ever been a claimant on a fire insurance company? If so, state when and name of office," was not an untrue answer, upon the ground that another member of the firm prior to his becoming a member had made claims upon a fire insurance company.³

In an old English case this rule was declared: A suppression or false representation of facts, material to be known by the insurers, vitiates a policy of insurance, although it was an answer to a parol enquiry and the policy is by the articles of the insurance office to be void on false answers being given to certain written enquiries. And upon this the court held that where a party going

¹ *Anders v. Supreme Lodge K. of H.* (1889), 51 N.J.L. 175.

² *Grogan v. London & Manchester Indus. Ass. Co.* (1886), 53 L.T. 761.

³ *Davies v. National F. & M. Ins. Co. of New Zealand* (1891), App. Cas. 485.

to insure her life for two years gave false answers to verbal enquiries whether she had effected similar insurance at other offices, the policy was thereby avoided.¹

288. Recent American decisions as to warranties and representations.—Parol evidence is admissible to explain a contract of insurance or to show a waiver of its conditions, or to show that an instrument is not the contract of a given party.²

It has been held that oral promissory representations will not be admitted in the absence of fraud,³ but it is otherwise where the oral representation is of an existing fact.⁴

As to burden of proof, the prevailing rule is that burden of proof of breach of warranty rests on the insurer as well as does the burden of proof of a material misrepresentation, and that the distinction sought to be established is not sound.⁵

The description of a statement as a warranty or a condition does not necessarily determine it to be a warranty, if the explanations accompanying the term show that a strict warranty is not intended; as where it was also stated in the contract that nothing but fraud or intentional misstatements should avoid the policy and that payment would be contested only in case of fraud;⁶ or where the word "warranted" is used in the application only and in the policy itself the statements are characterized as "representations,"⁷ or where it is stated in the contract that it shall be void if obtained by any fraud, misrepresentation or concealment,⁸ or where, though the contract state that the answers are warranted and represented to be correct, it also stated that the contract should be void if the answers and statements were in any material respect untrue or false or tended to deceive the insurer.⁹

It is not universally true that the materiality of a representation will be inferred from the fact that it was made in response to a specific enquiry of the insurer. The purpose of the enquiry must be considered to see whether the information is sought to

¹ Beach, 419. ² Cooke on Life Ins. 13.

³ Prudential Co. v. Aetna Co., 23 Fed. Rep. 438 (1885.)

⁴ *Idem*, and see Mut. Ben. Co. v. Robertson, 59 Ill. 123 (1871.) See also *supra* § 47. ⁵ See citations in Clarke on Life Ins. § 14 p. 25 n. 2.

⁶ Fitch v. Am. Popular Co., 59 N. Y. 557 (1875.)

⁷ Monlor v. Am. Co., 111 U. S. 335 (1884.)

⁸ Continental Co. v. Rogers, 119 Ill. 474 (1887.)

⁹ Schwarzbach v. Ohio Valley Protection Union, 25 W. Va. 622 (1885.) and see Campbell v. New England Mut. Co., 98 Mass. 38.

aid the insurer in fixing the terms of the contract or with a different object; as where an enquiry related merely to the payee of the insurance money, the statement in reply as to the relationship of the payee was held immaterial.¹

In arriving at the intention of the parties to an insurance contract, the court must look at their situation, the condition of the thing insured, and what was said or done at the time the insurance was effected. If the representations of the insured are in writing, that is the evidence of what they are; but if the application and representation are verbal, oral proof is competent to establish the same.²

288a. New York rule of construction.—The New York Court of Appeals has in a very late case declared this rule of construction: Conditions in an insurance policy which affect the contract and parties prior to the loss, including all statements and representations preceding the contract, receive a fair construction, according to the intention of the parties; but those conditions which relate to matters after the loss, defining the mode of adjustment and recovery, must receive a more liberal construction in favor of the insured.³

Even when the statements in the application are declared to be warranties, they will not be regarded as such if qualified by other stipulations which afford a fair inference that the parties themselves did not so intend them. And in one rather recent case the court construed the provision that "if any false representation is made by the assured of . . . or any over-valuation, or any misrepresentation whatever, either in a written application or otherwise, . . . this policy shall become void," when read as a whole, to show conclusively that a wilful misrepresentation as to the value of the property, or one made with such gross and reckless carelessness as in law would be treated as wilful, was in the contemplation of the parties.⁴

A representation is clearly distinguishable from a warranty, the former being a part of the proceedings which propose a contract and the latter a part of the contract when completed.

¹ *Vivar v. Supreme Lodge, etc.*, 20 Alb. Rep. 36. (Supreme Court of N. J. 1890), referred to *infra* § 288b.

² *Hoose v. Prescott Ins. Co. of Boston* (1890,) 84 Mich. 309.

³ *McNally v. Phoenix Ins. Co. of Brooklyn* (1893,) 137 N. Y. 389.

⁴ *Wheaton v. North British & Merc. Ins. Co.* (1898,) 76 Cal. 415.

A misrepresentation renders the contract void on the ground of fraud; a non-compliance with a warranty is an express breach of the contract. A fraudulent misrepresentation will avoid the contract, whether it is expressly so stipulated or not. Representations are *dehors* the contract.

If a policy be issued to the applicant without any answer to the enquiry as to value, there can be no breach of warranty as to value.

A statement of that which is necessarily, from its nature, matter of opinion is not strictly within the term "warranty" as applied to a contract of insurance.²

A statement of value in an application for insurance is not effectual as an over-valuation to defeat liability unless it is grossly and designedly excessive.³

288b. Warranty and representation distinguished.—The New York Court of Appeals, after reviewing the different parts of an insurance contract from the application down to the policy gave this as their conclusion: "The true construction of the papers is, that the policy is to be void only in case of intentional and fraudulent misrepresentation or suppression of facts by the applicant, and that although the term "warranty" is used, yet its legal effect is so modified by the explanations and declarations by which it is accompanied that it imports no more than an assurance that the statements are made honestly, in good faith, and are believed by the applicant to be correct and true."

Under this view of the contract they held that it is necessary, in order to sustain the defence based upon a breach of warranty, to show not only that the statements were untrue but that they were known by the insured so to be, and that they and the alleged omissions were made intentionally and with a fraudulent desire; and, to entitle the company to the non-suit asked, it was necessary that this fraud should be so conclusively proved that there was no question for the jury.⁴

Upon the distinction between warranties and representations, the Supreme Court of Alabama has given its conclusions as follows: "The distinction between a warranty and a representation in

¹ Beach § 386. ² *Idem*.

³ Redford v. Mut. Fire Ins. Co., 38 U. C. Q. B. 538.

⁴ Fitch v. American Popular Life Ins. Co. (1875), 59 N. Y., 557.

insurance is frequently a question of difficulty, especially in light of more recent decisions which recognise the subject as one of growing importance in its relations particularly to life insurance. As a general rule, it has been laid down that a warranty must be a part and parcel of the contract of insurance, so as to appear, as it were, upon the face of the policy itself, and is in the nature of a condition precedent. It may be affirmative of some fact or only promissory. It must be strictly complied with, or literally fulfilled, before the assured is entitled to recover on the policy. It need not be material to the risk, or whether material or not, its falsity or untruth will bar the assured of any recovery on the contract, because the warranty itself is an implied stipulation that the thing warranted is material.

It further differs from the representation creating on the part of the assured an absolute liability, whether made in good faith or not. A representation is not strictly speaking a part of the contract of insurance, or of the essence of it, but rather something collateral or preliminary, and in the nature of an inducement to it. A false representation, unlike a false warranty, will not operate to vitiate the contract or avoid the policy unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties. It is sufficient if representations be substantially true. They need not be strictly or literally so. A misrepresentation renders the policy void on the ground of fraud, while a non-compliance with a warranty operates an express breach of the contract. The mere fact that a statement is referred to, or even inserted in the policy itself, so as to appear on its face, is not alone now considered as conclusive of its nature as a warranty, although it was formerly considered otherwise.

Whether such statement shall be construed as a warranty or a representation depends rather upon the form of expression used, the apparent purpose of the insertion, and its connection or relation to other parts of the application and policy construed together as a whole, where legally these papers constitute one entire contract, as they most frequently do.¹

The Alabama Supreme Court formulated these rules as to construction of contracts of insurance bearing on the distinction between warranty and representation: "It requires the clearest

¹ Alabama Gold Life Ins. Co. v. Johnston (1887), 80 Ala. 487.

and most unequivocal language to create a warranty; and every statement or engagement of the assured will be construed to be a representation and not a warranty if it be at all doubtful in meaning, or the contract contains contradictory provisions relating to the subject, or be otherwise reasonably susceptible of such construction.

The court, in other words, will lean against that construction of the contract which will impose upon the assured the burden of a warranty, and will neither create nor extend a warranty by construction. Even though a warranty, in name or form, be created by the terms of the contract, its effects may be modified by other parts of the policy or of the application, including the questions and answers, so that the answers of the assured, so often merely categorical, will be construed, not to be a warranty of immaterial facts stated in such answers, but rather a warranty of the assured's honest belief in their truth or, in other words, that they were stated in good faith.

The strong inclination of the courts is thus to make these statements or answers binding only so far as they are material to the risk, where this can be done without violence to the clear intention of the parties expressed in unequivocal and unqualified language to the contrary."¹

The Supreme Court of the United States has declared these rules upon this subject:—"Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations as to which substantial truth, in everything material to the risk, is all that is required of the applicant.

The misrepresentation or concealment by the assured of any material fact entitles the insurer to avoid the policy. But the parties may, by their contract, make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurer as part of the basis of the contract.² Where an answer of the applicant to a direct question of the in-

¹ Alabama Gold Life Ins. Co. v. Johnston (1887), 80 Ala. 467, cited *supra*, and see *infra* § 288c. ² See *supra* § 279a.

surers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids policy issued on the application.

But where, upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further enquiry, they waive the want of imperfection in the answer, and render the omission to answer more fully immaterial.

These rules of construction were applied to a case where the questions, "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies?" were answered by the applicant: "Ten thousand dollars; Equitable Life Assurance Society." It appeared that a policy of that society was in fact the only other existing insurance.

They held that the answers were not warranties, but representations; and that the issue of a policy without further enquiry was a waiver of the rights of the insurers to require further answers as to the particulars mentioned in the questions, and estopped them to set up that the omission, though intentional, to disclose unsuccessful applications for additional insurance, was material and avoided the policy.¹

288c. Rules declared by the West Virginia Court of Appeals.—The Court of Appeals of West Virginia, in a well considered case, has thus declared the rules as to answers to questions, in the application for insurance: "The authorities all agree that if by the contract and policy the applicant warranted his answers to be true in all respects, then this removes their materiality from the consideration of the jury or of the court, and if the answers are any of them untrue, though they be such as the court or jury might be

¹ *Phoenix Life Ins. Co. v. Raddin* (1887), 120 U.S. 183; and see *Bernard v. United Life Ins. Ass'n*, 32 N. Y. Suppl. (1895), 223, 65 N. Y. St. Rep. (1895) 421; and *Home Fr. Soc. v. Berry*, 21 S. E. Rep. (1895), 583.

See also: *Penn. Mut. Life Ins. Co. v. Willer* (1884), 100 Ind. 92, as to effect of insurer being content with partial answer and declarations made prior to application—*Fidelity Mut. Life Ass. v. Ficklin* (1891), 74 Ind. 72, as to effect of answers to medical examiner—*Beach* 426—*Spring v. Chautauqua Mut. Life Ass'n* (1891), 41 N. Y. Suppl. 904, and *Brown v. Metrop. Life Ins. Co.* (1887), 65 Mich. 306; 7 N. Y. Suppl. 589; *Britton v. Royal Arcanum*, 46 N. J. Eq. 102; *Vivar v. Supr. Lodge Knights of Pythias*, 20 Alb. Rep. 36; *Campbell v. New England Mut. Co.*, 98 Mass. 381, as to false answers in application and burden of proof.

lieve could not have prejudiced the insurer, nor in any degree influenced the insurer in entering into the contract or issuing the policy, yet the insured in person, for whose benefit the policy was taken, cannot recover upon it.

But in ascertaining whether the answers to questions put to the applicant are warranties or representations, it should be borne in mind when a policy contains contradictory provisions, or is so framed as to render it doubtful whether the parties intend that the exact truth of the applicant's statements should be a condition precedent to any binding contract, the construction which imposes on the insured the obligations of a warranty should not be favored.

It may be regarded as settled that, in constructing a policy, the courts lean in favor of the construction which makes a statement of the insured a representation rather than a warranty and when, taking the whole policy and papers referred to in it as a part of it, together, it is doubtful whether the parties intended that the statements or answers of the insured should be regarded as representations or warranties, the court will construe them to be representations and not warranties.¹

When a fact is specially inquired about, by this specific inquiry the insurer shows that he regards this fact as material ; and a misrepresentation contained in an answer to such question avoids the contract, though the court or jury may think the inquiry is not in reality material, that is, that a true answer would probably have prevented the policy from issuing, or, if issued, would have caused the premium demanded to be increased.

There has been a considerable diversity of opinion as to what constitutes a misrepresentation which avoids a policy. Some hold that, if the representation is materially untrue, it avoids the policy, even when it is made in good faith and is the result of ignorance.

But there are other cases in which it is held that a representation as to a material fact will not necessarily avoid a policy simply because it is untrue, and that, in addition to its untruth, its falsity must be known to the insured."

Referring to the doctrine as to representations made *bona fide* and those made where in contemplation of law they were made *mala fide*, the court said : " This doctrine has peculiar and special

¹ See *supra* § 288b.

application to policies of life insurance ; for it is obvious that most of the facts set out, especially in the applications now generally attached to the policy and expressly made a part of it, are facts peculiarly within the knowledge of the insured, and whether he says so or not must be regarded as stated on his own personal knowledge, and as being by him intended to be so understood by the insurer. This being the case, if a part of this description is untrue in point of fact, he is guilty of legal fraud, though he may not have intended to deceive, and really did not act *mala fide* in point of fact.

But sometimes facts are stated by the insured which the insurers must, from the nature of the facts stated, have known were not stated as facts absolutely true and within the personal knowledge of the insured. When the facts stated are of this description, on the principles we have laid down, the policy should not be avoided merely because the statement turns out afterwards to be in point of fact untrue, if the statement was made in perfect good faith, and with the full belief, when the statement was made that it was true.

Of this character would be a statement in an application that the insured was of "sound body," for, of course, the insurer must have understood such a statement as made, not upon the personal knowledge of the insured, but upon his belief from all the knowledge he had of his constitution. For, of course, men sometimes believe they are of "sound body" when in point of fact they have some internal disease which in its character is fatal. When such a statement as this is made in an application for a life policy, on the principles we have laid down, the policy is not forfeited if the statement turns out to be untrue if, when it was made, the insured believed that he was of "sound body" and had no suspicion that he was the subject of an "internal disease" fatal in its character.

If, on the other hand, the insured in his application should state, in answer to a question, that he had not a serious illness for seven years, this statement the insurer must have regarded as made on his own personal knowledge, and if in point of fact it was untrue, on the principles we have stated, it must forfeit the policy, though he did not make the statement in point of fact *mala fide*, that is, with a purpose of deceiving, but only from thoughtlessness

or forgetfulness, or because he had forgotten that a serious illness which he had had was within seven years,"¹

"A misrepresentation of a fact made by the insured, whether such misrepresentation be an actual fraud or a legal fraud, will avoid a policy; but if there be an absence of all fraud, legal or actual, in the misrepresentation of a fact, such misrepresentation will not avoid a policy."²

¹ Schwarzbach v. Ohio Valley Prot. Union (1885), 25 W. Va. 622. ² *Ib.*

See also United Brethren Mut. Aid Soc. v. O'Hara (1888), 120 Pa. St. 256; Baumgart v. Modern Woodmen of America (Wis. 1893), 55 N. W. Rep. 713; Wright v. Mut. Ben. Life Ass'n (1887), 43 Hun. 61; Hermany v. Fid. Mut. Life Ass'n. (1891), 151 Pa. St. 17, as to answers in application regarding state of health—Brown v. Metrop. Life Ins. Co. (1887), 65 Mich. 306, for a definition of "sound health"—Perine v. Grand Lodge A.O.U.W. (1892), 51 Minn. 224 and Supreme Council A.L.H. v. Larmour (1891), 81 Tex. 71, for representations as to family history—Meachum v. N. Y. State Mut. Ben. Ass'n (1890), 120 N. Y. 237, Grand Lodge A.O.U.W. v. Belcham, 145 Ill. 308 and Mut. Life Ins. Co. of New York v. Thompson (Ky. 1893), 22 S. W. Rep. 87, for representations as to habits.

See cases cited in Cooke on Life Ins. 29 as to evidence of health and *idem* 31 as to meaning of "medical attendance," etc., also as to representations regarding same see United Brethren Mut. Aid Soc. v. O'Hara (1888), 120 Pa. State 256, cited above, Phillips v. N. Y. Life Ins. Co. (1890) 9 N. Y. Suppl. 836 and Cobb v. Covenant Mut. Ben. Ass'n (1881), 153 Mass. 176.

See Standard Life & Acc. Ins. Co. v. Martin (Ind. 1893) 33 N. E. Rep. 105; Home Mut. Life Ass'n v. Gillespie, 110 Pa. St. 84; Bancroft v. Home Ben. Ass'n (1890), 120 N. Y. 14 and Cotten v. Fid. & Cas. Co., 41 Fed. Rep. 506, for representations as to physical injuries.

See King v. Phoenix Ass. Co. (1888), 145 Mass. 426, for representation as to wooden houses near building insured—Chrisman v. State Ins. Co. (1888), 16 Or. 283, for answers to questions regarding value, title, location, occupancy and encumbrances, being held express warranties—Hosford v. Germania Fire Ins. Co. (1888), 127 U. S. 399, for warranty as to no smoking on premises—St. Paul F. & M. Ins. Co. v. Neidecken (1889), 6 Dak. 494, as to payment of premium note in case of contract being void from its inception owing to a material mis-statement, notwithstanding the statute providing for a return of premium if the insurer never incurred any liability (*vide supra* § 19.)

CHAPTER XI.

ADDITIONAL INSURANCE.

289. GENERAL REMARKS ON ADDITIONAL INSURANCE.

290. LEGISLATION ON ADDITIONAL INSURANCE.

291. CONDITION OF AVERAGE—CO-INSURANCE CLAUSE.

292. CONCURRENT INSURANCE—APPORTIONMENT OF LOSS.

293. WHAT CONSTITUTES, AND WHAT DOES NOT CONSTITUTE, SUFFICIENT NOTICE OF ADDITIONAL INSURANCE—FAILURE TO GIVE NOTICE BY INADVERTENCE—NOTICE NOT WITHIN REASONABLE TIME—DEFECTIVE NOTICE.

294. OTHER INSURANCE EFFECTED BY AND IN FAVOR OF THIRD PARTIES.

295. ADDITIONAL INSURANCE AND "SHORT TERM" RISKS.

296. SUBSTITUTION OF ANOTHER POLICY WITHOUT INCREASING THE AMOUNT—KNOWLEDGE OF AGENT

ACTING FOR ALL COMPANIES INTERESTED.

297. EFFECT OF OTHER INSURANCE BEING VOID OR VOIDABLE.

298. FALSE REPRESENTATION AS TO OTHER INSURANCE—REFUND OF INSURANCE MONEY UNDER THREATS OF CRIMINAL PROSECUTION.

299. GOODS IN WAREHOUSE—SUBSEQUENT MARINE INSURANCE NOT HELD COVERING THE SAME RISK.

300. RECENT AMERICAN DECISION AS TO NOTICE OF ADDITIONAL INSURANCE TO AGENT AND COMPANY—FAILURE OF AGENTS TO CANCEL, AS INSTRUCTED BY COMPANY.

301. VARIOUS AMERICAN DECISIONS.

302. RECENT AMERICAN DECISION ON COMPOUND AND SPECIFIC POLICIES—DO. ON FLOATING POLICIES AND LIMITATION OF LIABILITY.

289. General remarks on additional insurance.—The general doctrine that a previous or subsequent insurance without notice, under a policy requiring notice of such insurance upon pain of forfeiture, discharges the insurer from any obligation to pay for a loss happening under such circumstances, is well settled and universally recognized. That this should be the effect of the concealment or failure to give notice, as the case may be, is not only a part of the contract and obligatory upon that ground, but the forfeiture is just and reasonable. The insurer can never know the extent of his risk unless he knows everything that bears upon it. Additional insurance no doubt increases the risk.¹

Owners of different interests in the same property, however,

¹ See *Lymburner v. Stadacona Ins. Co.*, S. C. Montreal, II Stephens' Digest, 412, and see *infra* § 301. May, 364; Beach, 643.

and joint owners may respectively insure their interests without risk of violating a provision against double insurance.¹

The problem of two policies each containing a condition against other insurance has given rise to a large number of contradictory decisions in the United States. It is settled in Canada, however, that the question is simply whether double insurance has *de facto* existed; and the fact that a policy is voidable at the discretion of the insurer will not prevent its being invoked as a violation by the other insurer, as long as it has not been actually voided.²

Where the policy requires the company's consent in writing to double insurance, the courts seem to have become more liberal in favor of the assured than formerly, and there is a tendency in the modern cases to hold a notice given to the company or its agent to which no objection is made, as estopping the company from afterwards insisting on a forfeiture of the policy for want of their consent in writing.³

In the absence of any special enquiry or condition as to additional insurance, there is no obligation on the insured to refer to them.⁴

If the condition read that other insurance on any house or building insured must be notified without delay, insurance on goods need not be so notified.⁵

In the recent case of the *North British & Mercantile Ins. Co. v. Tourville*,⁶ the Supreme Court of Canada, Taschereau, J., remarked that over-insurance must be put a stop to, as much as it is in the power of the courts to do it. Therein lay one of the greatest sources of fraud in connection with the insurance business. If the assured is not in part a co-assurer with the company, that is to say, if the parties to the contract have not a common interest in the preservation of the property insured, one of the most efficient safeguards against fraud and crime is removed. Any such contract where the assured might expect to make a profit by the destruction of the property insured is, in law, tainted with immorality.

The insured is not relieved from giving notice of a prior in-

¹ May, 365.

² See *infra* § 297, *Jacobs v. Equitable Co.*, 19 U. C. Q. B. 250, and see *Gauthier v. Waterloo Mut. Ins. Co.*, 6 A. R. 231, *infra* § 298, and *Beach*, 645.

³ May, 370, and see *infra* § 293, and *Privy Council, Lancashire Ins. Co. v. Chapman*, 7 R. L. 47.

⁴ 13 L. N. 331. ⁵ *Ib.* 323. ⁶ 25 S. C. R. 195.

insurance by the fact that the first insurance expires in a few days and that he does not intend to renew it.¹

It has also been decided that the mere admission by the insured, in his sworn declaration of loss, that there was further insurance, was not a sufficient proof of violation of the condition prohibiting further insurance, and a second insurance in a company of bad reputation and which had no license was held not an infraction of the condition.²

The 23rd section of the Act 4 William IV, c. 83, respecting double insurances on houses or buildings, does not apply to insurance on goods.³

290. Legislation on additional insurance.—The Ontario Insurance Act,⁴ the Manitoba Fire Insurance Policy Act,⁵ and the British Columbia Fire Insurance Policy Act,⁶ contain statutory conditions declaring fire policies null if there is prior or subsequent insurance without the company's consent, unless the company has had notice and has not dissented within two weeks from such notice.

In practice, while double insurance is usually stipulated against, the companies do not appear to insist upon the invalidity of policies where double insurance is effected without notice but without fraud. In these cases each company contributes ratably.⁷

291. Condition of average—Co-insurance clause.—In certain cases the companies require the assured to maintain concurrent insurance so that the total amount may equal seventy-five or eighty per cent, as the case may be, of the actual cash value of the property, with a condition that, if he do not, he shall himself be a co-insurer for an amount sufficient to make up the difference and in that capacity shall bear his proportion of any loss.

A case arising out of the co-insurance clause in a policy of fire insurance was recently decided by the Ontario Court of Appeals. The policy, the subject of the suit, was for \$5,000, and contained a 75 per cent. co-insurance clause, reading in the terms

¹ 13 L.N. 324.

² National Ins. Co. v. Rousseau, 13 Q.L.R. 295 Q.B., but see Ramsay Woolen Cloth Manuf. Co. v. Mut. Fire Ins. Co., 11 U.C.Q.B. 518, Merritt v. Niagara Dist. Ins. Co., 18 U.C.Q.B. 529.

³ Q.B. Chalmers & Mutual Fire Ins. Co., 3 L.C.J. 2.

⁴ 60 Vic. c. 36 (O.) s. 168, ss. 8 and 9. ⁵ R.S.M. 1891, c. 59, stat. con. 8.

⁶ 1893, c. 12, stat. con. 8 and 9. ⁷ C.C.L.C. 2516 and 2517.

given below as the "co-insurance clause," in use in Quebec, and to the same effect in Ontario. The property insured was valued at \$28,732, and the total insurance carried was \$10,000. A fire occurred, the loss by which was appraised at \$3,226, and the assured sought to recover the full proportion of this loss, namely, three-fifths, or \$1,935, under the policy in question. The company, relying on the co-insurance clause, contended that the insured was co-insurer to the extent of \$11,549, the deficiency between the insurance carried and 75 per cent. of the value of the property, and that the company's share of the entire loss was not in the proportion of 6,000 to 10,000, but of 6,000 to 21,549, or \$898 instead of the \$1,935 sought to be recovered.

The Court found that the contract was intended by both parties to be one of co-insurance.

As the co-insurance clause, however, is not part of the form of contract prescribed by the Ontario Insurance Act, and the policy in this case did not conform to the provision of the Act requiring that any omission from or addition to the prescribed form shall be printed in conspicuous type and in ink of different colour, the co-insurance clause was held to be of no effect.¹

In another case the fourth variation from the Ontario statutory conditions was, that in no case should the insured be entitled to recover more than two-thirds the actual value of any building or contents or other property insured, nor in case of further insurance by the insured or other party more than the ratable proportion of two-thirds of the actual value without reference to the date of the different policies and that any general policy on different properties should be treated as a special policy on each property for the whole amount thereby insured. The insurance was \$1000 on barn and stables, valued at \$1,200 and \$900 on contents valued at \$8,000. Per Cameron, C. J., and Rose, J., that as to the latter part of the condition referring to further insurance by the insured or other party, it was unjust and unreasonable, but as to the former part thereof, as to the payment of not more than two-thirds of the value of the property insured (which meant at the time of loss) it was just and reasonable.²

In a recent American case³ the court decided that the clause

¹ Wanless v. Lancashire Ins. Co., 23 A. R. 237. 60 Vic. c. 36 (O) s. 169.

² Graham v. Ont. Mut. Ins. Co., 14 O.R., 358.

³ Pool v. Mill. Mech. Ins. Co., 65 N. W. Rep. 54 (1895).

providing against other insurance without the consent of the company had been waived by attaching to the policy the 80 per cent. co-insurance clause.

The "Co-insurance clause" applied in the city of Montreal and adjoining municipalities, and also in use in Ontario, reads as follows :

"It is a part of the consideration of this policy, and the basis upon which the premium is fixed, that the assured shall maintain insurance on each item of property insured by this policy, of not less than eighty per cent. of the actual cash value thereof, and that, failing to do so, the assured shall be a co-insurer to the extent of such deficit and in that capacity shall bear his, her, or their proportion of any loss."

"This clause does not affect the settlement of a loss :—

1. When the property insured is totally destroyed, the full amount of insurance is paid upon proof of such total loss ;
2. When the property is insured for not less than eighty per cent. of its actual cash value.

But the clause does affect the settlement of a loss in the event of the property being only partially destroyed with insurance less than 80 per cent. of its actual cash value."

292. Concurrent insurance—Apportionment of loss.—In a recent Ontario case plaintiff had insured his building against fire in two different companies in separate amounts for the front and rear portions, and the whole building, without division, in a third company. Fire took place damaging both front and rear, nearly all the injury being done to the rear.

It was decided that the proper method of ascertaining the relative amounts payable by the different companies was to add the amounts of all the policies together without reference to the division of the risk, and that each company was liable for its relative proportion to the whole amount insured.'

The same question was dealt with quite recently in the United States in a case where the policy provided that "this company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby insured shall bear to the whole insurance." The plaintiff had other in-

insurance in the Knoxville Fire Insurance Company, which was in all respects concurrent with defendant's policy, and also a policy in the Phoenix Insurance Company for \$3,000, which latter policy contained an eighty-per cent. co-insurance clause. The value of the property damaged by fire was \$10,000. The damage occasioned by the fire was \$2,200. The total insurance carried by plaintiff was \$5,000.

The court was of opinion that the loss should be apportioned amongst the companies as follows: The Phoenix Company contracted to pay three-eighths of the loss, provided \$8,000 insurance was obtained, but as the plaintiff secured but \$5,000, the total insurance the Phoenix assumed was such proportion to the \$2,000 taken by the defendant and the Knoxville Company as \$3,000 (the sum the Phoenix originally agreed to take), bears to \$5,000, the amount plaintiff agreed to place with other companies. The total amount of insurance applicable to the loss, therefore, was \$3,200, of which the Phoenix carried three-eighths, or \$1,200, and each of the other companies five-sixteenths, or \$1,000. The actual loss should be apportioned among the three companies: The Phoenix three-eighths, or \$825.00, and the defendant and the Knoxville Company \$687.50 each.¹

As to contribution in cases of concurrent insurance, see also *Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.* 25 Ins. L. J. 252, and *Rickerson v. German-American Ins. Co.* (N. Y. S. C., App. Div), 39 N. Y. Suppl. (1896), 547.

In *Ætna Ins. Co. v. McLeod et al.*, 25 Ins. L. J., 669 (1896), it was decided that in order to share in benefit of limiting clauses in other policies the company must plead specially.

293. What constitutes, and what does not constitute, sufficient notice of additional insurance—Failure to give notice by inadvertence—Notice not within reasonable time—Defective notice.—A condition of a policy issued by a fire insurance company was, that notice of any other insurance on the property insured should be given to the company, and that the same should be endorsed on the policy, or otherwise acknowledged and approved by them in writing, else the policy to cease. The insured subsequently effected another insurance on the property, and forwarded a written notice of the fact to the secretary of the company, who

¹ *Armour et al. v. Reading Fire Ins. Co.*, 2 Miss. App. Rep. (1896), 1402.

replied the next day, "I have received your notice of additional insurance." The court considered that the insured had done enough, and that there was no breach of the condition, because the insurance company must have apprehended that plaintiff would understand it so, according to all fair interpretation.¹

It was held in one Quebec case that the condition usually endorsed on policies, respecting double insurance, will be held to be waived on the part of the company if their agent, on being notified of such double insurance *after the fire*, makes no specific objection to the claim of the assured on that ground.² But this decision was reversed in Appeal,³ and the Supreme Court of Canada have decided otherwise.⁴

In another Quebec case, decided in 1857, where a policy of insurance granted permission in the body thereof to insure elsewhere on giving notice to that end to the directors of the company, in order that the second insurance might be endorsed on the policy, and required by the by-laws of the company printed on the back of the policy that such notice be given and such second insurance endorsed on the policy *à peine de nullité*, it was nevertheless held, that a notice of such second insurance given after the fire, and as a consequence not endorsed on the policy, was sufficient, the majority of the court going so far as to hold that the strict good faith incumbent on the insurer was incompatible with such a plea. It is to be noted, however, that it appears from the dissenting opinion of Day, J., in that case that the directors knew of the second insurance before the fire; and the decision may perhaps be justified on the ground of their acquiescence.⁵

A policy of insurance against loss by fire contained the following condition: "In case of subsequent insurance on any interest in property assured by this company (whether the interest assured be the same as that assured by the company or not) notice thereof must be given in writing at once, and such subsequent assurance endorsed on the policy granted by this company, or otherwise acknowledged in writing; in default whereof such policy shall thenceforth cease and be of no effect." The insured effected subsequent insurance and verbally notified the agent, but there was

¹ Potter v. Ontario & Livingston Mut. Ins. Co., 5 Hill 147.

² Atwell v. Western Ass. Co., 1 L. C. J. 278 C. R. ³ 2 L. C. J. 181.

⁴ Western Ass. Co. v. Doull, 12 S. C. R. 446, *infra*.

⁵ Soupras v. Mutual Fire Ins. Co. of Chambly, etc., 1 L. C. J., 197.

no endorsement made on the policy, nor any acknowledgment in writing by the company. A loss having occurred, the damage was adjusted by the inspector of the company, and neither he nor the agent made any objection to the loss on the ground of non-compliance with the above condition. In a suit to recover the amount of the policy, the company pleaded breach of the condition, in reply to which the plaintiff set up the waiver of the condition, and contended that, by the act of the agent and inspector, the company were estopped from setting it up.

The court considered, in opposition to the view of the court below, that the insured not having complied with the condition, the policy ceased and became of no effect on the subsequent insurance being effected, and that neither the agent nor the inspector had power to waive a compliance with its terms.¹

A condition in a policy providing for a forfeiture of the policy in case of additional insurance, without the written consent of the company endorsed upon the policy, may be waived, either by parol agreement or by the conduct of the company; and silence for an unreasonable time upon the part of the company after knowledge or notice of the breach of the condition will constitute such conduct.²

In another case where the insured was required on pain of forfeiture to notify the company of any other insurance, the company, after the fire and after a knowledge that other insurance had been effected, supplied forms for making claim and otherwise treated the contract as binding on it. This was held to be a waiver of all objections based on the condition requiring notice of other insurance.

The plaintiff, who was insured against fire with the defendants for \$1,000, effected a change of mortgagees on the insured property. The new mortgagees refused to accept the defendants' policy, and insured the property for the same amount with another company, notifying the plaintiff of the fact by letter. The plaintiff showed the letter to the defendants' secretary-treasurer, asking him to bring the matter before the board, and was then informed

¹ Supreme Court of Canada, *Western Ass. Co. v. Doull*, 12 S. C. R. 446, and see decisions in 13 L. N. 325, and *infra* chap. XIII as to waiver by agent of any condition of the policy, and see *McKay v. Glasgow & London Ins. Co.*, 32 L. C. J. 125 *supra* §§ 279 and 282.

² *Phoenix Ins. Co. v. Splers* (1888), 87 Ky. 285.

³ *Fonderle de Jollet v. Stadacona Ins. Co.*, 6 L. N. 277.

by him that it would be all right and that there was nothing further to do. Subsequently the plaintiff paid an assessment on defendants' policy, which accrued after the notification of the double insurance, and which was received by defendants and entered in their books. It did not appear that this payment was on account of losses incurred by defendants previous to the double insurance. The plaintiff's property was destroyed by fire the day the "Ontario Insurance Act, 1877," came into force.

The decision was that the R.S.O. (1877) c. 161, in force at the time insurance was effected, applied to the policy.

Also, that the showing of the letter to the secretary-treasurer was not a notification in writing as required by R. S. O. (1877), c. 161, s. 40.

But the court decided that the policy being voidable at the defendants' option, the receipt and entry in their books of the assessment after the secretary-treasurer was aware of the double insurance, operated as an estoppel upon them.¹

In an action to recover the amount of a fire policy, the defendants, being a mutual society, pleaded the statute which voids an insurance contract where there has been another insurance effected without their consent, and also a special condition of the policy to the same effect.

The court said that a variety of circumstances had been adverted to, tending to show a knowledge by the defendants of the existence of another contract. That, however, did not appear under any reasonable view of the law to be enough. There must be a consent. The words of the statute were: "Unless the double insurance subsists with the consent of the directors signified by endorsement on the policy, signed by the manager or the secretary, or other officer authorized to do so, or otherwise acknowledged in writing." This was not satisfied by evidence of mere knowledge on the part of the insurers of other contracts.²

One Mazurette (represented by his assignee, the appellant) effected an insurance on his stock with the respondents, and in the policy there was a condition that insurance elsewhere would make the policy void, unless the company received notice of such subsequent insurance.

¹ McIntyre v. East Williams Mut. Fire Ins. Co., 18 O.R. 79; see Klein v. Union Fire Ins. Co., 3 O.R. 234; Cockburn v. British Am. Ass. Co., 19 O.R. 245.

² Dustin v. Hochelaga Mutual Fire Ins. Co., S.C. Montreal, 1880, 4 L.N. 205.

Mazurette failed by some inadvertence to give notice of an insurance effected subsequently in the Commercial Union Assurance Company. The court decided that he could not recover on the policy.¹

To an action on a fire policy in a mutual insurance company, the defendant set up as a defence the 8th Ontario statutory condition, that the company were not to be liable for any loss "if any subsequent insurance be effected in any other company unless and until the company assents thereto by writing, signed by a duly authorized agent." By 44 Vict. c. 20, sec. 28 (Ont.) the Fire Insurance Policy Act is made applicable to mutual fire companies,² except where the provisions of the Mutual Act are inconsistent with, or supplementary, or in addition thereto. Section 39 of the Mutual Act enacts in substance that, if a double insurance subsists in defendants' company and another company, the defendants' policy should be void, unless such double insurance subsists with the directors' assent endorsed on the policy, signed by the secretary, etc., or otherwise acknowledged in writing, and section 40, that whenever the company receive notification in writing of an additional sum being assessed on the same property in another company, the same shall be deemed assented to unless the company within two weeks after the receipt of such notice signify their dissent in writing.

The defendants' policy was effected on the 31st July, 1884. On 4th January, 1886, the plaintiff effected a further insurance in another company for \$1,000. On 8th March, 1886, the plaintiff wrote defendants: "I hereby notify you that I have put a second insurance on my stock and farm implements." On 10th March the defendants replied informing plaintiff that he had not "given the number of the policy or the amount of the insurance, or the name of the company." The plaintiff did not reply to this, because, as he said, he was away from home. The loss occurred on the 16th March. The jury found that the plaintiff had not within a reasonable time after effecting the further insurance notified the defendants, but that the notice was reasonably sufficient as far as he knew.

It was decided that under section 39 the insurance was void.

¹ Beausoleil v. Can. Mut. Fire Ins. Co., 1 L.N. 4, and see Greet v. Citizens Ins. Co. and do. v. Royal Ins. Co., 5 A.R. 596.

² See *supra* § 247.

and that, under the circumstances, there could be no implied assent under section 40; and further, that the notice was not sufficient. Per Gault, J., the insurance was also avoided under the 8th statutory condition, and if section 40 could be held to be supplementary thereto, the plaintiff, by reason of the defective notice, did not come within it.¹

294. Other insurance effected by and in favor of third parties.—In *Traders' Ins. Co. v. Roberts*² it was held that, as the mortgagor had no power to affect the mortgagee's rights by a release, he could not do so by a breach of the condition regarding other insurance, and the mortgagee could therefore recover; but the principle of this case was disapproved in *Grosvenor v. Atlantic F. I. Co. of Brooklyn*, in the N. Y. Court of Appeals,³ and in the case of *Tillon v. Kingston M. I. Co.*⁴ it was held, that the mortgagee could not recover, if the mortgagor break the condition in question.

The majority of the Court of Appeals, Quebec, followed *Traders' I. Co. v. Roberts*, and *Tillon v. Kingston M. I. Co.*, in *Black v. National Ins. Co.* and *Harris v. National Ins. Co.*⁵

It has been held in Quebec, however, that the non-disclosure of existing insurances, in violation of the conditions of the policy, is a cause of nullity, even when the undisclosed insurance was effected by a third person, if the insured had knowledge of it, and he will be assumed to have knowledge of it where his deed bound him to insure in favor of his vendor, or in default, to pay premiums.⁶

It has also been said, that a mortgage creditor insuring is not bound to declare other insurances save his own, although he is aware of insurance contracts made by the mortgagor,⁷ and the same principle applies to insurances by former owners.⁸

A policy of insurance issued by a mutual fire insurance com-

¹ *Graham v. London Mut. Fire Ins. Co.* 13 O.R. 132.

² Referred to in 13 L. N. 204, 325.

³ *M. L. R.*, 1858. The *Grosvenor* case was approved by the Supreme Court of Illinois in 1870; *Illinois Mut. F. I. Co. v. Fix*, 5 Am. Rep.

⁴ *Scld.* 405. ⁵ Cited *supra* § 198.

⁶ *Mackay v. Glasgow and London Ins. Co.* *M. L. R.* 4 S. 124. referred to *supra* §§ 279, 282 and 298; and see *Picard v. British Am. Ass. Co.* *M. L. R.* 2 S. C. 117, 14, *R. L.* 136, for effect of further insurance by a hypothecary creditor with the knowledge of the assured.

⁷ 13 L. N. 324, 325. ⁸ *Idem.*

pany was held void under sect. 30 of chap. 68 C. S. L. C. where a second insurance had been taken upon the same property for the benefit of the mortgage creditor (of which the premiums were paid by the owner) without notice to company issuing first policy.¹

295. Additional insurance and "short term" risks.—A person effected an insurance against fire for one month, the insurance being subject to the conditions of the fire insurance policies of the company. He asked for a policy, but was told it was not customary to issue policies for short dates. Among the conditions of the fire policies of the company was one requiring notice of any other insurance effected on the property and endorsement of such insurance on the policy. The insured failed to give such notice.

The court decided, that the non-delivery of a policy to the insured was a waiver on the part of the company of the conditions cited.²

In the same case it was decided, that where an insurance is effected under a "short risk receipt," and without a policy, notice of a second insurance given after the fire only, but in time to have both companies contribute ratably, is sufficient.³

In another case the plaintiff, desiring to effect further insurance for two months on certain machinery, applied to defendants' company through one S., their agent at D., authorized to receive applications, accept premiums and issue interim receipts, valid only for thirty days. He informed S. that there were other insurances on the property, but not knowing the amount that there was in the Gore Mutual requested him to ascertain it, and signed the application partly in blank, paid the premium and obtained an interim receipt, valid only for thirty days. S. failed to do what he promised to do, and what plaintiff had entrusted him to do, and forwarded the application to the head office at T., making no mention of the insurance in the Gore Mutual. The company accepted the risk and in accordance with their practice, where the risk extended only over a short period, instead of a formal policy, they issued a certificate, which stated that the plaintiff was insured subject to all the conditions of the company's policies, of which he admitted cognizance, and that in the event of loss it

¹ *Blais v. Stanstead and Sherbrooke Mutual Fire Ins. Co.* 15 R. L. 60 S. C. 1886.

² *Q.B. Lafleur v. Citizens Ins. Co.* 1 L.N. 518, 22 Q.C.J. 247.

³ *Idem.* See also *supra* chap. V., for other cases of short term insurances.

would be replaced by a policy. The machinery was subsequently destroyed by fire after the thirty days, but within the two months, and the policy was thereupon issued, endorsed with the ordinary conditions, one of which was that notices of all previous insurances should be given to the company and endorsed on the policy, or otherwise acknowledged by them in writing, or the policy should be of no effect and another was, that all notices for any purposes must be in writing. The insurance in the Gore Mutual was not endorsed on the policy.

In view of these facts the court considered that, as the application in writing did not contain a full and truthful statement of previous insurances, the verbal notice to the agent of the existing policy in the Gore Mutual without stating the amount was inoperative to bind the company; the plaintiff was not entitled to have the policy reformed by the endorsement of the Gore Mutual policy thereon, and could not recover.¹

296. Substitution of another policy without increasing the amount—Knowledge of agent acting for all the companies interested.—Where the appellants sued upon a policy of insurance made by the respondents on the 28th April, 1877: On the face of the policy it appeared that there was “further insurance, \$8,000,” and the policy had endorsed upon it the following condition, being statutory condition No. 8 R. S. O. c. 162: “The company is not liable for loss if there is any prior insurance in any other company, unless the company’s assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected, in any other company, unless and until the company assent thereto by writing signed by a duly authorized agent.” Among the insurances, which formed a portion of the “further insurance” for \$8,000 mentioned in the policy, was one for \$2,000 in the Western Insurance Company, which appellant allowed to expire, substituting a policy for the same amount in the Queen Insurance Company, without having obtained the consent of, or notified the respondents.

It was decided, reversing the judgment of the court below, that the condition as to subsequent insurance must be construed to point to further insurance beyond the amount allowed by the policy, and not to a policy substituted for one of like amount to lapse, and therefore the policy sued upon was not avoided by

¹ Supreme Ct. of Canada, *Billington v. Provincial Ins. Co.*, 3 S.C.R. 182.

the non-communication of the \$2,000 insurance in the Queen Insurance Company.¹

In another case, the plaintiff, being the owner of a quantity of railway ties and lumber, effected insurance thereon with three companies to the amount of \$4,000 and subsequently with the knowledge and through the agency of the person acting on behalf of the several companies, effected an additional insurance of \$1,200 on the same property in the "Fire Assurance Association." He asked the plaintiff for the interim receipt of that company which he gave up accordingly and he substituted one in the Gore District Company for it, he being agent for that company also, but omitted to give any notice or make any entry as to the substitution of the Gore Insurance for that of the "Fire Association." In an action to recover the amount of the insurances, after a destruction of the property by fire :

In the opinion of the court this was not such an omission on the part of the plaintiff as invalidated the policies.²

The plaintiff, who was insured in the defendants' company under a policy containing a condition that the "company is not liable if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing—signed by a duly authorised agent," effected an insurance with the Mercantile Ins. Company which was void at their option on account of a similar condition, the policy with the defendant not having expired as a matter of fact, though the plaintiff was led by the agent of the other company to believe it had. It was decided, as in the Queen's Bench,³ that the plaintiff could not recover, for the insurance in the Mercantile Company, being not void, but only voidable, was a subsequent insurance within the meaning of the condition.⁴

And it was also decided, following *Parsons v. The Standard Insurance Company*,⁵ that a change in the company in which another insurance has been effected, not increasing the amount insured, did not avoid the policy.⁶

¹ Supreme Court of Canada, *Parsons v. the Standard Fire Ins. Co.*, 5 S. C. R. 233. see also *Pacaud v. the Monarch Ins. Co.*, 12 C. J. 284 and see 13 L. N. 331.

² *Moore v. Citizen's Fire Ins. Co.*, 14 A.R., 582, following *Parsons v. Standard Ins. Co.*, 43 Q.B. 603, 4 A.R., 326, 5 S. C. R. 233. ³ 44 Q. R. 490.

⁴ *Gauthier v. Waterloo Mut. Ins. Co.*, 6 A.R. 231, and see *supra* § 239.

⁵ *Supra*. ⁶ *Lowson v. Canada Farmers' Mut. Fire Ins. Co.*, 6 A.R. 512.

297. Effect of other insurance being void or voidable.—The validity of the clause inserted in some policies providing against other insurances, whether valid or invalid, has been questioned in New Hampshire; on the other hand, its validity was not questioned, but rather admitted, in Maine.¹ And in a very recent Texas case, a policy providing that it should be void if the insured had, or should thereafter procure, “any other insurance, whether valid or not,” was avoided by afterwards procuring another policy, which, by reason of a similar clause therein, was void and never attached.²

It has been decided in Ontario, in accordance with what has been said *supra* § 289, that a second insurance may be voidable by second insurers and yet be a good and sufficient insurance to set aside a first insurance, being unnotified to the first insurers, contrary to the conditions of their policy.³

298. False representation as to other insurance—Refund of insurance money under threats of criminal prosecution.—In a recent New Brunswick case the policy warranted that there was no other insurance on the house, and by one of the conditions of the policy, if there was any other insurance, the defendants were not liable. There was a previous insurance on the house in another insurance company at the time the plaintiff insured with the defendants, the amount of which he received on the burning of his house, and the defendants soon afterwards paid him the amount insured by them, he having, in an affidavit in his proof of loss, stated that there was no other insurance on the house than the amount insured by them.

Soon after this, the defendants having heard of the previous insurance, claimed a return of the money paid him, and he refunded it, but afterwards brought an action in the county court to recover it, on the ground that he paid it under threat of a criminal prosecution. He swore on the trial that before he refunded the money the defendants’ agent threatened to prosecute him for perjury unless he did so. He denied any knowledge of the statement in the policy that there was no previous insurance on the house,

¹ See 13 L. N. 325.

² *Wilson et al. v. Aetna Ins. Co.* (Texas C. C. A.), 33 S. W. Rep. (1896), 1065, and see *supra* § 289.

³ *Jacobs v. Equitable Ins. Co.*, 19 U. C. Q. B. 250, and see also 13 L. N. 325. But see also *Sweeting et al. v. Mutual Fire Ins. Co.*, in Hartford County (Md. C. A.), 34 Atl. Rep. (1896), 826, as to validity of subsequent insurance being held necessary.

and stated that, if there was such a statement in the proof of loss which he signed after the fire, it must have been added after he had signed the paper. He was contradicted by the defendants' witnesses in both these statements, and also in his statement that he would be arrested on a *capias* if he would not pay, the defendants' agent, to whom the money was paid, denying that there was any threat of a criminal prosecution, but that he told the plaintiff that if the money was not returned he would be arrested on a civil process by the sheriff's officer, who was present. There was evidence that criminal proceedings were spoken of when the parties met for the purpose of settling, but it tended to show that it was a statement by the defendants, made after the plaintiff had agreed to pay, that they could prosecute the plaintiff for perjury, and not a threat to himself that they would do so if the money was not refunded.

The judge directed the jury that, in his opinion, the evidence was insufficient to show that the money was repaid by the plaintiff under extortion or undue pressure; but he left it to them to find whether it was so extorted from him, stating his opinion that the plaintiff's evidence on the point was completely negatived by the defendants. The jury found a verdict for the plaintiff, which the judge set aside and granted a new trial on the ground that it was contrary to evidence and to his charge.

The court decided on appeal: 1. That the verdict was not perverse, there being evidence on both sides on the question of extortion, and the case having been left to the jury on that question, and no direction to find for the defendants.

2. Allan, C. J., and Tuck, J., were of opinion that the verdict was not such a one as the jury might reasonably find under the evidence, and that the judge was warranted in granting a new trial.

3. Wetmore and King, JJ., considered that, as the jury had found for the plaintiff, it must be assumed that his evidence was true as to the threat of criminal proceedings against him if he did not refund the money; and therefore that the evidence was sufficient to make out the plaintiffs case, and the verdict should stand.¹

299. Goods in warehouse—Subsequent marine insurance not held covering the same risk.—The plaintiffs effected a policy

¹ Campbell v. Glasgow & London Ins. Co., 30 New Bruns. Repts. 332.

of insurance with the defendant as chairman of a fire insurance company for £3,000, "on wool in bales or fleeces 'greasy' and 'washed,' in all or any shed or store, on station, or in transit to Sydney by land only, or in any shed or store, or in any wharf in Sydney, until placed in ship." The policy contained a provision as follows: "No claim shall be recoverable if the property be previously or subsequently insured elsewhere, unless the particulars of such insurance be notified to the company in writing."

The plaintiff subsequently effected an insurance with a marine insurance company to cover £16,500 upon wool, the risk being described as "at and from the River Hunter to Sydney per ships and steamers and thence per ship or ships to London, including the risk of craft from the time that the wools are first waterborne, and of transshipment or landing and reshipment at Sydney." The frequent practice at the port of Sydney is that wool, arriving there for shipment, is not delivered direct to the ship for which it is intended, but is conveyed to the stores belonging to the persons who are acting as the stevedores of the ship and is there pressed for the purpose of reducing its bulk. By the practice in the course of business, the stevedore's receipt is regarded as between the ship and the shippers as equivalent to the mate's receipt, and bills of lading are given in exchange for it. Certain wool belonging to the plaintiffs was forwarded by several consignments by several steamers from the River Hunter to Sydney. The plaintiffs' agent at Sydney had the wool conveyed on its arrival to his own stores, for the purpose of being weighed, and entered into a contract for its conveyance to London on board a ship. The wool was then conveyed from the warehouses to the stores of the stevedores of the ship, who gave the usual receipts for the same.

While in the stevedores' warehouses, a portion of the wool was destroyed or damaged by a fire and the plaintiffs sought to recover such loss upon the policy effected with the defendant company. The company resisted the claim upon the ground that the policy of marine insurance above-mentioned came within the terms of the provision in the fire policy, and ought to have been communicated to them.

The court decided, that the marine did not cover the wool in the stevedores' warehouses, and was not such an insurance as the plaintiffs were bound under the provision in the fire policy to

notify the defendant company, and that the plaintiffs were therefore entitled to recover.¹

300. Recent American decision as to notice to agents and company—Failure of agents to cancel, as instructed by company.

—In one case it appeared that the assured obtained further insurance on her dwelling, which, unless consented to in writing by the company, voided its policy. There was testimony competent to prove that, after obtaining the additional insurance, the assured notified the special agents of the company, who undertook to communicate with the insurer, and to let the insured know the result. There was also proof of an admission by the company's general manager from which it could be inferred that the company had received actual notice of these facts, and had directed the agents to cancel assured's policy, which they neglected to do until after assured's dwelling was destroyed by fire.

Upon an action upon the policy, the Court of Errors and Appeals of New Jersey held, that a non-suit was properly refused, there being proof from which the jury might find that the insurer was estopped by its conduct from setting up the forfeiture of the assured's policy.²

Garrison, J., said : " At the close of the assured's case there was testimony competent to prove, that she had in good faith submitted to her insurers' actual knowledge of a state of facts that placed it wholly within their power either to continue their contract of indemnity, or to relieve themselves of all obligation respecting it ; that they took the matter under advisement, and decided upon the latter course, which decision, owing to the laches of the agent to whom its execution was entrusted, was not communicated to the insured until she had been injured by fire. The case thus presented would, in my opinion, come within the elemental rule of estoppel, that in dealing with others no one shall be permitted to deny that he intended the natural consequences of his conduct, when such conduct has in fact induced others to rely upon it to their loss. The natural consequence of the failure of the company to communicate to the assured its decision was to induce in her the belief that it acquiesced in the further insurance of

¹ Australian Agricultural Co. v. Saunders, 10 C.P. 668.

² Agricultural Ins. Co. of Watertown v. Potts (N.J. 1893), 28 Atl. Rep. 27.

Mr. W. C. Rodgers has recently published an article in 43 Central Law Journal (1896) 134, entitled : " Stipulations in Policies against Additional Insurance."

which she had given notice, and, so long as this belief continued, she was lulled into a false security with respect to her property."

"After the loss had occurred it was too late for the company to set up for the first time in avoidance of its obligation the very state of facts with full knowledge of which it had permitted the assured to rest secure in her supposed protection." The court thus disposed of any claim that these agents were the agents of assured in this matter: "Granting that they were her agents for the purpose of communicating to the insurer the status of her insurance, the company, by entrusting them with the execution of its decision, touching a matter solely within its power, constituted them its agents, so that their negligence in this respect is the negligence of the insurer. There is, it is needless to say, a marked distinction between cases such as this, in which notice given to an agent is in point of fact communicated to the principal, and those in which the principal is charged upon mere proof of notice to an agent. In the latter case, the power of the agent to bind his principal is limited by the scope of his actual or apparent authority; whereas, in the former case, no question of agency arises, the sole question being as to the legal duties of the principals themselves growing out of knowledge actually imparted. For a like reason the present case is uncomplicated by any question as to the delegation of the power of waiver. Whatever difference of opinion may exist as to the effect of notice to, or waiver by, a special agent in a given case, there can be no diversity of sentiment as to the plenary power of a party to a contract to waive any condition intended for his benefit, either before or after forfeiture, whether by express declaration or by conduct so misleading that it estops him afterwards from claiming the forfeiture."

301. Various American decisions.—For other American decisions on the question of additional insurance see:—*Hardy et al. v. Lancashire Ins. Co.*, 25 Ins. L. J. 746 (1896), as to additional insurance by mortgagor without knowledge of mortgagee.—*Niagara Fire Ins. Co. of City of N. Y. v. Johnson*, 45 Pac. Rep. 789 (1896) and *Fireman's Fund Ins. Co. et al. v. Norwood et al.* (U. S. C. C. A., 8th Cir.), 69 Fed Rep. (1895), 71, as to estoppel of company by knowledge of agent of additional insurance.—*Home Fire Ins. Co. v. Hammang et al.* (Neb. S. C.), 24 Ins. L. J. (1895), 493, as to agent forgetting to make endorsement of additional insurance; *Anderson v.*

Manchester Fire Ass'ce Co. (Minn. S. C.), 63 N. W. Rep. (1895), 241, as to knowledge of other insurance by delivery of policy.—*First National Bank of Devil's Lake v. American Central Ins. Co.* (Minn. S. C.), 24 Ins. L. J. (1895), 56 ; *Burnham et al. v. Greenwich Fire Ins. Co.*, 56 Mo. App., 582 (1895), and *Liverpool & Ldn. & Globe Ins. Co. v. Sheffy* (Miss. S. C.) 16 South. Rep. (1895), 307, as to parol consent to further insurance.—*West v. Norwich Union Fire Ins. Soc.* (Utah S. C.), 37 Pac. Rep. (1894) 685, as to agent promising to endorse additional insurance.—*Sun Fire Office v. Clark et al.*, 42 N. E. Rep. 248 (1895), as to increase of risk by additional insurance.—*Wilson v. Mut. Fire Ins. Co.*, 25 Ins. L. J. 549 (1896), as to waiver by continuing to make and collect assessments with knowledge of additional insurance.—*Dewitt v. Agricultural Ins. Co. of Watertown*, 36 N. Y. State Rep. 566 (1896) and *State Ins. Co. v. New Hampshire Trust Co.*, 25 Ins. L. J. 307 (1896), as to additional insurance "procured by the insured" construed.—*Union Nat. Bk. of Oshkosh v. German Ins. Co. of Freeport*, 71 Fed. Rep. 473 (1896), as to additional insurance in excess of amount permitted by policy.

302. Recent American decision on compound and specific policies—Floating policies—Limitation of liability.—In a recent American case, property situated on two separate blocks was insured to a certain amount under policies covering the entire property on both lots. The property on one block was further insured by a policy covering that alone, which contained a provision that the company should not be liable for a greater proportion of any loss than the amount insured should bear to the whole insurance. The property covered by this policy was partially destroyed, that on the other block remaining uninjured.

The court decided, that the compound policies covered the property destroyed to their full amount, so that the proportion of the loss to be borne by the specific policy was the proportion which that policy bore to the total amount of both the compound and specific policies.

And in another recent American case, the plaintiff held two floating policies of insurance,—one issued by defendant, and the other by the H. Co. Defendant's policy provided that defendant should not be liable for any greater proportion of any loss than the amount which its policy bore to the total amount of insurance, nor

¹ *Page et al. v. Sun Ins. Office*, 25 Ins. L. J. (1896), 855.

cover a greater amount than \$600 in any one building. The policy issued by the H. Co. contained the same provision, except that its liability was limited to \$300 in any one building.

The court was of opinion, that in case of any loss defendant was liable for two-thirds thereof.¹

¹ Golde et al. v. Whipple et al., 39 N. Y. Suppl. (1896), 964.

CHAPTER XII.

TRANSFERS AND ASSIGNMENTS.

303. LEGISLATION ON TRANSFERS AND ASSIGNMENTS.

304. GENERAL REMARKS ON TRANSFERS—LEX LOCI CONTRACTUS GOVERNS.

305. TRANSFER OF INTEREST IN FIRE RISK VALID WITHOUT COMPANY'S APPROVAL—RULE CONTRARY AS TO TRANSFER OF OBJECT INSURED—QUESTIONS OF WAIVER—ASSIGNMENT IN FORM AN ABSOLUTE TRANSFER, BUT IN FACT A COLLATERAL SECURITY—DEED TO CREDITOR WITH RIGHT OF REDEMPTION NO ALIENATION—ASSIGNMENT BY PAROL AND DELIVERY, ATTACHMENT BY CREDITORS—POLICY RETURNED BY GENERAL AGENT UNENDORSED HELD VOID—EFFECT OF CONSENT OF COMPANY TO ASSIGNMENT AND RIGHT TO UNEARNED PREMIUM—CONVEYANCE OF PROPERTY, ASSIGNMENT OF POLICY, CONSENT OF COMPANY NOT ENDORSED—ASSIGNMENT OF POLICY TO PURCHASER OF PROPERTY WITH CONSENT OF COMPANY AND BREACH OF CONDITION BY ORIGINAL ASSURED.

306. A CHATTEL MORTGAGE IS A CHANGE OF TITLE AVOIDING POLICY.

307. SALE OF INSURED PROPERTY FORMERLY HELD TO TRANSFER INSURANCE—RIGHTS UNDER AN ASSIGNMENT.

308. CONTRACT TO PULL DOWN BUILDING, LOSS BEFORE TRANSFER OF POSSESSION—CONVEYANCE OF LAND UPON WHICH PROPERTY STANDS.

309. PARTNERSHIP TURNED INTO COMPANY—AVOIDANCE OF POLICY.

310. INSURANCE EFFECTED BY OFFICIAL ASSIGNEE.

311. PROPERTY SOLD FOR MUNICIPAL TAXES—REDEMPTION OF PROPERTY.

312. TRANSFER OF RIGHTS IN CO-PARTNERSHIP.

313. SHORT TERM INSURANCE—LOSS PAYABLE TO CREDITORS—NOTICE TO AGENT.

314. COVENANT TO INSURE IN MORTGAGE—EQUITABLE ASSIGNMENT.

315. ASSIGNMENT OF POLICY—LOSS BEFORE ASSENTED TO IN WRITING—SALE BY OPERATION OF LAW.

316. SALE TO PROTECT JUDICIAL SURETY.

317. TRANSFER OF POLICY TO PURCHASER—SALE WITH RIGHT OF REDEMPTION—ALLEGED MISREPRESENTATION—KNOWLEDGE OF AGENT.

318. ALIENATION BY INSOLVENCY—NO TRANSFER TO ASSIGNEE OBTAINED.

319. ASSIGNMENT OF LIFE POLICY WITHOUT CONSENT OF BENEFICIARY—EFFECT OF DEATH OF BENEFICIARY—AMERICAN DECISIONS ON ASSIGNABILITY OF LIFE POLICIES—TONTINE INSURANCE IN FORM OF A TRUST ASSIGNMENT FOR MUTUAL BENEFIT.

320. TRANSFER OF LIFE POLICY—EXECUTOR CANNOT CLAIM UNTIL TRANSFEREE'S CLAIM IS SETTLED—INCOMPLETE TRANSACTION.

321. SURRENDER OF LIFE POLICY OBTAINED BY ALLEGED FRAUD.

303. Legislation on transfers and assignments.—In Ontario,¹ Manitoba,² and British Columbia³ by statutory condition, if the property insured is assigned without written permission of the

¹ 60 Vic. c. 36 (O), s. 168, ss. 4. ² R. S. M., 1891, c. 59, stat. con. 4.

³ B. C. Ins. Policy Act, 1893, c. 12, stat. con. 4.

company, the policy becomes void; except in cases of change of title by succession, by operation of law, or by reason of death.

In Quebec a transfer of the insured property renders the policy void, unless done with the consent of the company,¹ but the policy may always be assigned with the thing insured, subject to the conditions contained in it.²

Fire policies may be transferred to those only who have an insurable interest, but life policies may be transferred to parties having no insurable interest.³

304. General remarks on transfers—Lex loci contractus governs.—It has been at times contended that because contracts for insurance are said to be *uberrimæ fidei*, a contract for the purchase and sale of a policy is also *uberrimæ fidei*, but this contention is not maintainable, and the rules which govern the purchase and sale of policies are the same as those which govern the purchase and sale of any other species of personal property.⁴

The leading English case on the question of the law applicable to transfers of policy moneys is *Lee v. Abdy*.⁵ In that case plaintiff sued the trustees of an English life assurance company as assignee of a policy of life insurance granted by such company. The assignment of the policy was made in Cape Colony and, at the time of such assignment, the assured (the assignor) was, and he remained till his death, domiciled in Cape Colony, and the plaintiff was his wife. By the law of that colony such an assignment was void by reason of the alleged assignee being the wife of the assignor, and it was decided, that the law of Cape Colony applied to the assignment of the policy, and therefore that the defendants were entitled to judgment.

305. Transfer of interest in fire risk valid without company's approval—Rule contrary as to transfer of object insured—Questions waived—Policy returned by general agent unendorsed held void.—It has been held in Quebec, that the interest in the insurance money might be legally assigned by any simple form of transfer endorsed on the policy; that such transfer did not require the consent or acceptance of the insurance company to make it binding;⁶ and that the transfer by endorsement on the

¹ C. C. L. C. 2576, 2483. ² R. S. Q. 1888, art. 6271.

³ 55 Vic. c. 39, se. 35, subs. 2 (Ont.) and C. C. L. C. 2482.

⁴ See remarks of Armour, C.J., in *Potts v. Temp. & G. L. Co. of N.A.*, 23 O.R. 73.

⁵ 17 Q. B. D. 309.—See also *supra* § 92 for *lex loci contractus*.

⁶ *O'Connor v. Imperial Ins. Co.*, 14 L. C. J. 219, but see *Cross v. B. A. Ins. Co.*, 1 R. C. 243, Review.

policy, but without alienation of the thing assured, gave to the transferee no more rights than had the transferor; that he was subject to all the conditions of the policy, and could not recover unless the assured had made proof of loss.¹

A similar decision has very recently been given in Ontario. In this case² the defendants issued a policy of insurance to one McNulty for \$1,200; \$600 on his dwelling and \$600 on the contents thereof. The land and buildings were at this time mortgaged to the plaintiff for \$3,000, and the loss, if any, under the policy as issued was to be payable to the plaintiff, as his interests might appear. Later, McNulty executed under seal an assignment of the policy by endorsing on it a statement that it was transferred to plaintiff in consideration of the mortgage.

The policy did not contain the usual provision that a transfer without the company's consent should avoid the policy, nor was the company's consent to the above transfer obtained. Subsequently McNulty gave the plaintiff a mortgage upon the chattels. A fire occurred later, and there was a total loss on the buildings and a partial loss on the contents.

The company resisted the plaintiff's claim for payment on the ground that the assignment without their consent rendered the policy void, and that as to the chattels the plaintiff could in no event recover, as at the date of the assignment he had no interest in them.

The first court gave judgment for plaintiff in respect of the loss of the buildings for \$600, and for \$140 in respect of the loss on chattels, and the Court of Appeals confirmed the judgment.

The judges said, that "when a fire policy is said to be unassignable, even in equity, without the consent of the insurers, it must be taken to mean that the transfer which is prohibited is that of the entire ownership. The assignment in this case did not profess to vary in any respect the contract of insurance. It was, as has been held in several American cases, a mere appointment in favour of McPhillips to receive, and a direction to the insurers to pay to him, the loss when, if at all, it should occur."

"The interest of McNulty in the property continued as before,

¹ C. R., *White v. Home Ins. Co.*, 2 R. C. 232; *New York Life Ins. Co. v. Parent*, 3 Q. L. R. 163, and see also *McPhillips v. London Mut. F. I. Co.*, *infra*, and *Willey & Mut. Fire Ins. Co. of Stanstead*, 2 Q. B. R. 29.

² *McPhillips v. London Mut. Fire Ins. Co.*, 23 A. R. 524.

but it was an appropriation beforehand to the payment of the plaintiff's debt of the money secured by the policy, should that loss ever become payable. There was no valid objection to such an assignment. If instead of this formal assignment it had taken the shape of an order on the insurers to this effect: "In the event of loss, pay the amount of such loss to McPhillips,"—what objection could there have been to such an order? It simply converts one of the parties into a trustee for the other. It is only a contingent order or assignment of what may become due under the policy."

"The defendants had compared this to the case where the insured had sold the property out and out, and had attempted by assignment or transfer, without the consent of the company, to attach or continue the risk to the goods in the hands of the new owner. That is what was referred to in the passage cited from *Griffey v. New York Central Insurance Co.*, 100 N. Y. 417,¹ and in Bunyon's *Law of Fire Insurance*, 4th edition, pp. 14, 256; but there was not the least analogy between the two cases."

"Here, McNulty remained the owner of the goods insured. All he did was to assign his interest in the policy, and the benefit and advantage he might derive therefrom in case of loss, to the plaintiff as collateral security. It was no more than an assignment of a chose in action, to which no consent by the insurers was necessary. McNulty remained the insured, but he provided thereby that the loss, if it occurred, should be payable to some one else, who was in fact his own creditor. No case in our law was cited which forbids that to be done. The assent of the insurers is essential only where the policy is assigned to accompany a sale of the property insured and a new contract of insurance is intended to arise between the purchaser and the insurance company. Subject to the chattel mortgage, McNulty was at the time of the fire both owner and insured. The assignment having been by way of security, the action ought properly to have been brought in his name, but as he had refused to become party plaintiff it was properly maintained in the name of the plaintiff as assignee."

Whether a provision of a policy of fire insurance that "if this policy should be assigned before a loss without the consent of the company endorsed thereon" the policy should be void, would be violated by a pledge of a policy of insurance as collateral security

¹ See *infra* p. 481.

to a creditor of the holder, has been considered fully by the New York Court of Appeals, and these are their declarations as to the proper construction of the provisions of the policy and the law applicable to such a pledge :—

“ In the first place, it is apparent that nothing but an effectual assignment or transfer will come within the terms of this provision. In this case the policy was not transferred. No interest in the insured property was conveyed, but it all remained as before. In case of loss, therefore, the transferee could not recover, not only because he had suffered no loss and was not a party to the contract, but the transfer of the policy was not accompanied with any interest in the subject of insurance. The clause in question, although of several members, is in itself single, and is aimed against the transfer, or any change in title or possession, of the insured property, and the assignment of the policy which it prohibits is in connection with the events which affect the ownership of the things insured. They must not be construed together. Otherwise the words relating to the policy would have no meaning. Without them the assignment would be inoperative for any purpose. It would not render the policy void, but it would be of no value. If the property was burned, the underwriters would be under no obligation to pay anyone : not the assignee, for the property destroyed did not belong to him, so he incurred no damage, nor the assured, for he had parted with the contract of indemnity. But, if we take the prohibition as applying to the policy disconnected from the property, it would not work the result claimed by the insurer.”

“ An assignment is a transfer or setting over of property, or of some right or interest therein, from one person to another, and, unless in some way qualified, it is properly the transfer of one's whole interest in an estate or chattel or other thing. In that sense the policy in question has not been ‘assigned.’ It, with others, was delivered to the creditor upon an agreement that the policy should stand as collateral security for certain claims held by it against the insured, and in case of loss to the property insured, they should ‘be payable’ to the bank as its ‘claim against the insured should appear.’ The assured did not part with the title. The transfer was not unconditional. They retained not only the whole insured property, but an interest in the policy. In any proceeding for its enforcement they would have been a necessary

party;¹ and upon payment of the debt entitled to what they in fact have had—a redelivery of the policy.”

“The agreement under which they transferred it did not profess to vary in any respect the contract of insurance. It was at most a mere appointment of the bank to receive and a direction to the insurers to pay to it the loss when, if at all, it should accrue. In other words, it was an appropriation beforehand to the payment of specific debts of a portion of the money which might become due by reason of the cause insured against, and the plaintiffs had as much interest in the policy after its pledge to the bank as they had before. The money for which the insurers might become liable was to be applied to their use. The bank held it in trust as bailee, and not as owner, and until by an act of the assured some person other than themselves should stand in that situation, the prohibition against the assignment could not apply, and the policy remained valid to protect their interests.”²

“In Conover’s case, *supra*, the charter of the defendant provided that, whenever the insured property ‘shall be alienated by sale or otherwise, the policy shall thereupon be void,’ and it was held, that the words did not embrace a mortgage, since it creates but a lien or security and does not transfer the title; and in Shearman’s case, *supra*, the same rule was held to apply to a clause forbidding a transfer of the policy. To take away the cause of action in one case, and to render void the policy in the other, equally requires a transfer or alienation of the entire insurable interest. It seems, indeed, to be well settled that, so long as the insured retains such an interest that he may be a sufferer by the loss, the policy remains valid to that extent.”³

In a recent American case it appeared, that there was a sale

¹ Simpson v. Saterlee, 64 N. Y. 657; Johnson v. Hart, 3 Johns. Cas. 323; Conover v. Mut. Ins. Co., 1 N. Y. 290; Bard v. Poole, 12 N. Y. 495; Whitney v. McKinney, 7 Johns. Ch. 144; Field v. Mayor, &c., 6 N. Y. 179.

² Hitchcock v. Northwestern Ins. Co., 26 N. Y. 68; Jackson v. Silvernail, 15 Johns. 278; Shearman v. Niagara Fire Ins. Co., 2 Sweeney 470; Lazarus v. Commonwealth Ins. Co., 5 Pick. 76, 80.

³ Griffey v. N. Y. Central Ins. Co. (1885), 100 N. Y. 417, referred to *supra*. See also Lynde v. Newark Fire Ins. Co. (1885), 139 Mass. 57, where agent had no authority to assent to an assignment in form and understood to be an absolute transfer, but in fact made as collateral security.—Nussbaum v. Northern Ins. Co. (1890), 37 Fed. Rep. 524, where a deed to creditor to secure debt with right of redemption was held to be no alienation.—Leinkauf v. Colman (1888), 110 N. Y. 50, as to assignment by parol and delivery, and attachment by creditors.

of the property insured and an assignment of the policy without the company's consent, as required in the condition in the policy regarding such matters. The assignee sent the policy to an agent, who returned it unendorsed, explaining that he had no authority to authorize a transfer, and suggesting that the policy be sent to the general agent, who would endorse thereon the company's consent. It was sent to this general agent, who returned it unendorsed, without explanation. The assignee, supposing it to be properly endorsed, made no examination of it, put it away, and never saw it again until after the loss.

The Indiana Appellate Court held, that there was no contract of insurance with the assignee and no liability on the policy.¹

It was insisted for the insured in this case, that the assignment of the policy without the company's consent did not *ipso facto* operate a forfeiture, but, having received notice of the assignment, some act or declaration upon the part of the company was necessary to produce that result, and having remained silent, the breach of condition was waived.

The court said: "It is argued that the word 'void' should be construed as 'voidable.' In many instances, after an insurance company has notice of the breach of a condition which, according to the terms of the policy, would result in a forfeiture, it must in some affirmative manner manifest its avoidance of the policy, or the condition will be taken as waived.

"A void contract is incapable of being inspired with legal vitality, except by some act equivalent in effect to a new execution. Hence it follows that the breach of any condition that can be waived renders the contract voidable only. But a different principle applies to the question involved in this appeal.

"Insurance policies are contracts of indemnity, and are essentially personal in their nature. They relate to the insured rather than to the subject matter of insurance, and at common law were non-assignable. There is no statutory provision changing the common law rule, but after a loss has occurred the policy becomes a chose in action, and is assignable as other choses in action are. Courts know, as a matter of general knowledge, that the character of the insured is taken into account as affecting the moral hazard

¹ *New v. German Ins. Co. of Freeport* (1892), 5 Ind. App. 82. See also *Manchester et al. v. Guardian Assur. Co.* (N. Y. S. C.), 30 N. Y. Suppl. (1894), 49; 61 N. Y. State Rep. (1894), 779.

of a risk, and this is an additional reason why a change of indemnity should not occur without the consent of the indemnitor.

"An insured must have an interest in the subject of insurance, or the policy will be held a wager contract, and void as against public policy. Having obtained valid insurance, if the interest of the policy-holder ceases in the property covered, the policy at once becomes inoperative. There is then no possibility of a loss, consequently no basis for indemnity. The contract being one of indemnity and personal to the insured, it follows that any assignment by him, with a transfer of the title to the property, transfers no right in the insurance to the assignee without the consent of the insurer. Such consent is equivalent to the creation of a new contract between the assignee and the insurer, according to the terms of the policy assigned. It is not strictly an assignment, but the making of a new contract. This being the case, there never was any contract between the assignee of the policy and the insurer, and consequently no conditions that could be waived. After the transfer of the title, the insured had no insurance, because he had nothing to insure. Hence, no right passed by the assignment of the policy. The assignee had no right to rely upon the suggestion of the first agent to whom he sent the policy that the general agent would endorse the company's consent to the transfer. Conditions may be waived by silence under some circumstances, but it is rare that entirely new indemnity contracts may be created in that manner."¹

306. A chattel mortgage is a change of title avoiding policy.—Where a policy of insurance against fire provides that in the event of any sale, transfer or change of title in the property insured, the liability of the company should thenceforth cease, and that the policy should not be assignable without the consent of the company endorsed thereon, and all encumbrances effected by the assured must be notified within 15 days therefrom, there is no doubt that a chattel mortgage on the property insured is not a sale or transfer within the meaning of this condition, but it is a "change of title"

¹ See also *Hall v. Niagara Fire Ins. Co.* (1892), 93 Mich. 184, for effect of consent of company to assignment and right to unearned premium.—*Lett v. Guardian F. Ins. Co.* (1890), 125 N. Y. 82, and cases cited there, as to conveyance of property, assignment of policy, consent of company not endorsed.—*Ellis v. Ins. Co. of N. A.* (1887), 32 Fed. Rep. 646, and *Continental Ins. Co. v. Munns* (1889), 120 Ind. 30, as to assignment of policy to purchaser of property with consent of company, and breach of condition by original assured.

which avoids the policy, and further, it is an encumbrance even if the condition means an encumbrance on the policy.¹

The question of a mortgage operating as a change of title was fully discussed in a recent case in the United States; the leading cases on the subject were reviewed, but the holding was different from that of the Supreme Court of Canada just cited.²

307. Sale of insured property formerly held to transfer insurance—Rights under an assignment.—It was formerly held in Quebec, that the interest of the vendor of real estate in a policy of insurance against fire, effected by the vendor previous to the sale, passed by operation of law to the purchaser, the sale being notified to the company and that a payment made by the insurance company to the vendor on a loss occurring after the sale, of a sum larger than the balance of the purchase money remaining unpaid, enured to the benefit of the purchaser as a discharge for such balance.³ But as we have seen, this is no longer the law.⁴

In a Quebec case, one Page transferred to appellant two insurance policies issued by respondents. Subsequently the property insured was destroyed by fire, but this was only after Page had ceased to have any interest in such property. On a claim by appellant to recover the amount of said policies, the court decided: 1st. That the assignee of a policy issued by a mutual insurance company can only exercise such claims as the transferor could himself have done. 2nd. That, in this case Page having ceased to have any title to the property insured when the fire occurred, he could not recover the amount insured under the policies aforesaid and that the appellant was therefore debarred from such claim.⁵

The rights of third parties having an insurable interest in the objects covered by the policy are not affected by subsequent acts of the insured, but if the assignee of a policy is not interested in the property insured he does not, by such assignment and the assent of the company thereto, become the assured under the policy, and

¹ Supreme Court of Canada (on appeal from the Supreme Court of Nova Scotia), *Citizens Ins. Co. of Canada & Salterio*, 23 S.C.R. 155, (*Sovereign Ins. Co. & Peters*, 12 S.C.R. 33, distinguished) and see *Torrop v. Imperial Fire Ins. Co.*, 26 S.C.R. 585; *May v. Standard Fire Ins. Co.*, 5 A.R. 605; 26 Chy. 115; *Sand v. Standard Ins. Co.*, 27 Chy. 167; 14 O.R. 322; *Bull v. North British Can. Invest. Co.*, 15 A.R. 421.

² See *Union Ins. Co. v. Barrett* (1893), cited with other cases in point in *Beach*, 604. ³ *Leclaire v. Crasper*, 5 L.C.R. 487.

⁴ C.C.L.C. 2483. *Q.B. Forgie & Royal Ins. Co.*, 16 L.C.J. 34, *supra* § 303.

⁵ *Willey & Mut. Fire Ins. Co. of Stanstead*, 2 Q.B.R. 29, and see *Guerin v. Manchester Fire Ins. Co.*, R. J. Q. 5. Q. B. 434, *infra* chap. XVII.

the policy still remains liable to be defeated by a breach of the conditions by the assignor.¹

308. Contract to pull down building, loss before transfer of possession—Conveyance of land upon which property stands.—The fact that the owners of an insured building had entered into an executory contract for the pulling down of a building insured and for the sale of the materials to the contractors at a sum very much less than the amount of the insurance was held, in a recent Ontario case, to be no bar to their right to recover the full amount of the insurance when the building was burnt down before the time fixed by the contract for the transfer of possession.²

And in another recent Ontario case, where the policy in one sum covered buildings and chattels, and the land upon which the buildings stood was conveyed by deed without the consent of the insurers, in breach of the fourth statutory condition,³ the policy was considered avoided *in toto* and did not remain in force as to the chattels.

In this case, the distinction between the breach of that condition and the first condition was pointed out.⁴

309. Partnership turned into company—Avoidance of policy.—Where the business of a partnership was taken over by a limited liability company formed for that purpose, there was held to be such a change of interest as to invalidate insurances held by the firm in the absence of notification of the change to, and assent by, the insurance company, though the members of the partnership held nearly all the stock in the limited liability company.⁵

310. Insurance effected by official assignee.—A loss under a fire policy effected by an official assignee under the "Insolvent Act" of 1875, to whom an assignment had been made under the Act, has been held recoverable by the assignee subsequently elected by the creditors, notwithstanding that in the policy the assured was described simply as "official assignee," the loss being made payable to the estate so assigned to him. And it was con-

¹ *Kanady v. Gore Dist. Mut. Ins. Co.*, 44 U.C.Q.B. 261.

² *Ardill et al. v. Citizens Insurance Company*; *Ardill et al. v. Aetna Insurance Company*, 20 A.R. 605, and see *supra* § 134b. ³ 60 Vic. c. 36 (O) s. 168, ss. 4,

⁴ *Gore District Mutual Fire Insurance Co. v. Samo*, 2 S.C.R. 411, applied.

⁵ *Judgment of Armour, C.J.*, reversed. *Dunlop v. Osborne, and Hibbert v. Farmers' Mutual Fire Insurance Co.*, 22 A.R. 364.

⁶ *The A. G. Peuchen Co. et al. v. The City Mutual Fire Ins. Co.*, 18 A.R. 446.

sidered such loss may be so recovered, notwithstanding that the fire had occurred after the appointment of the second assignee, and that his appointment had not been specially communicated to the insurance company before the fire ; and that, under the circumstances of the case, there was not any change, either of ownership or possession.¹

311. Property sold for municipal taxes—Redemption of property.—In a Quebec case the action was for \$800, amount of a fire policy, and the plea was that the property insured was, after the issue of the policy, sold for taxes under the municipal code, and the ownership having become vested in the purchaser, the insured had lost all insurable interest therein. Special answer that the municipal sale never finally divested the insured of the ownership ; that before the fire he had, under the provision of the municipal Code, redeemed his property, and had never ceased to have an insurable interest in it.

It was decided, that the sale of the property for municipal taxes under a municipal Code, followed, as it was, by the redemption of the property in accordance with said court, was not such alienation as would void the policy, either under the conditions endorsed upon it, or under the conditions of article 2576 of the Civil Code.²

312. Transfer of rights in co-partnership.—Where in another Quebec case one McD. transferred to M. all his rights in a co-partnership existing between them on condition that M. paid him \$3000, acquitted the partnership debts and the personal debts of McD., and until payment of the \$3000, he would hold the merchandise insured and hand the policies to McD. ; the merchandise was at the time insured in name of McD. alone in two mutual insurances by three policies which were to expire some months later and which McD. renewed ; McD. and M. subsequently closed their accounts :—

It was decided, that the transfer of the merchandise did not transfer the policies which only continued to cover the goods in which McD. had an insurable interest and that M. owed contributions for losses anterior to the expiration of the policies only as partnership and personal debts of McD., but that those subsequent

¹ Elliott & National Ins. Co., 23 L.C.J. 12.

² Paquet v. Citizens Ins. Co., 4 Q.L.R. 230.

to the renewal of the policies were due by McD. only, without recourse against M., and that McD. had no recourse against M. except for contributions for losses anterior to the expiration of the policies which were not declared to him, before the settlement.¹

313. Short term insurance—Loss payable to creditors—Notice to agent.—In a case decided by the Supreme Court of Canada, the appellant, being indebted to certain persons and desiring to have his stock of goods insured, applied to the agents of respondents for insurance to the amount of \$2,000 for three months, "loss, if any, to be payable to his creditors of whom G. McK. is one and McK. & Co. are second." An interim receipt was issued by the company, dated 19th November, 1877, which stated the insurance to be subject to the conditions contained in and endorsed upon the printed form of policy in use by the company, one of which conditions (No. 4) stated that, if the property insured should be assigned without a written permission endorsed on the policy by an agent of the company duly authorized for such purpose, the policy should be void.

On the 28th November, the appellant transferred the insured property to the said G. McK., in trust for his creditors, the balance, if any, to be payable to himself. The agent of the company was notified of this transfer and assented to it, stating that no notice to the company was necessary, the policy being made payable to the creditors. The property was destroyed by fire on the 15th January, 1878. The policy sued upon was dated the 12th December, 1877, but was not delivered until the morning after the fire. By it the loss was made "payable to G. McK. & Co., and others as creditors, as their interests may appear." After the fire the inspector of the company wrote twice to McK. calling for proof of loss.

The Supreme Court of Canada decided, reversing the judgment of the Court of Appeal for Ontario :—(1) That the notice of the trust assignment to the company's agent was sufficient, that the company must be considered as having assented to such assignment, and as having executed the policy with full knowledge of it; and that such assignment was not one contemplated by the condition of the policy; (2) That the words "loss payable, if any, to G. McK., etc." operated to enable the respondents in fulfilment

¹ McDonald v. Messer, 10 Q.L.R. 32, Q.B. 35 L.C.J. 17.

of that covenant to pay the parties named ; but as they had not paid them and the policy expressly stated the appellant to be the person with whom the contract and the respondent's covenant was made, the action for a breach of that covenant was properly brought by him alone.¹

314. Covenant to insure in mortgage—Equitable assignment.—It has been held in Ontario, that the usual covenant to insure contained in a mortgage executed under the "Act respecting Short Forms of Mortgage," operates as an equitable assignment of the insurance when effected.²

315. Assignment of policy—Loss before assented to in writing—Sale by operation of law.—In another Ontario case, one G. insured a tug when navigating the rivers Sydenham, St. Clair, Detroit and Thames, and Lake St. Clair, loss, if any, payable to M., as his interest might appear. M., at the time of insurance and down to the happening of the loss, was mortgagee. The tug was libelled in the American Admiralty Court, and to avoid the claim thereon G. used the proceedings therein upon a claim for wages to have a fraudulent sale thereof made to J. Afterwards, G. procured a renewal of the policy without disclosing the sale of which, however, defendants were subsequently notified. G. with defendants' assent assigned the policy to M., but before that assent was put in writing the tug was burned in the Chenail Ecarti, one of the channels of the St. Clair. M. and J. delivered proof papers of claim, which were objected to. G. did not deliver any. At the trial leave was given to add G. and J. as co-plaintiffs and judgment was directed to be entered for the plaintiffs for the full amount of the insurance. The Q.B.D. (12 O.R. 706) decided, that the action was properly constituted and gave judgment in favour of the plaintiff. On appeal, that judgment was affirmed with costs on the ground that the relation of trustee and *cestui que trust* had been created between G. and the plaintiff in respect of the policy moneys. Burton, J. A., dissenting, Armour, J., considered that the sale of the tug was by operation of law.³

¹ Supreme Court of Canada, *McQueen v. The Phoenix Mut. F. Ins. Co.*, 4 S.C.R. 660. See also *supra* ch. V. for other cases of interim receipts and short term insurances.

² *Greet v. Citizens' Ins. Co.*, and *do. v. Royal Ins. Co.*, 5 A.R., 596.

³ *Mitchell v. City of London Ins. Co.*, 15 A.R. 262, and see *Howes v. Dom. Fire & Mar. Ins. Co.*, 8 A.R. 644. *Royal Ins. Co. v. Beers*, 9 O.R. 120.

316. Sale to protect judicial surety.—In a Quebec case, where the action on a policy of insurance by which the plaintiff's stock-in-trade, consisting of fancy goods was insured against loss by fire, the principal plea of the Company was to the effect that, contrary to a condition endorsed on the policy, a sale and transfer of the goods of plaintiff had been made to one F. in consideration of a certain suretyship entered into by F. in favor of plaintiff's brother, in order to obtain the release of the brother from jail. To this the plaintiff answered, that there had been no delivery of the effects mentioned in the deed of sale; that the stock had always remained in plaintiff's possession and the deed was without effect. Condition No. 2 on the back of the policy was as follows:—"Without written permission of the company it will not be liable for loss or damage if any change takes place in the occupation, location, title or position of the property herein specified. In every case without such permission this policy is void and all insurance thereunder immediately ceases and determines." The sale to F. was before notary and was to be void at the expiration of suretyship which, however, did not occur until after the fire. The court was of opinion that the policy was null.¹

317. Transfer of policy to purchaser—Sale with right of redemption—Alleged misrepresentation—Knowledge of agent.—In another Quebec case, an action was taken for \$3,280 under a policy issued in favor of one who, on the 23rd August, 1876, transferred to appellant. The fire occurred 27th September, 1876. The plea was, that the transferor obtained the policy on the representation that he was proprietor of the property, which was untrue. By the evidence it appeared, that in 1871, some years previous to the issue of the policy, the transferor sold the property to appellant with the stipulation that he would be at liberty to take back, as soon as he had repaid appellant the amount he owed him, he himself remaining in possession. At the time of the issue of the policy this relation was made known to the agent, and a policy made out and transferred to appellant for the whole amount of the insurance, although his interest amounted only to \$1,510. It was decided, reversing the judgment of the court below, that he should have judgment for that amount.²

¹ *Semmelhaack v. Canada Fire & Marine Ins. Co.*, 4 L.N. 205, S.C. 1881.

² *Sheridan v. Ottawa Agricultural Ins. Co.*, 2 L.N. 206, Q.B. 1879.

318. Alienation by insolvency — No transfer to assignee obtained.—And where an action was taken under a policy of insurance to recover a loss by fire, the plaintiff being assignee in insolvency to one McK. ; there were several pleas fyled, the first of which admitted the execution of the policy subject to the conditions contained in it, and also the possession of the estate of the insured by the plaintiff as assignee at the time of the fire, but set up that the insurance was effected on the mutual principle and that one of its conditions was, that it was made subject to the provisions of the statutes of Ontario regulating the organization of mutual insurance companies, which were to be used to ascertain the rights and obligations of the parties.

The court said, that it was a distinct proviso in the body of the policy that "this policy is made and accepted subject to the Statutes above mentioned," that is to say, the Statute of Ontario, 36 Vic. c. 44, and those consolidated and amended by it. That was the contract between the assurer and the assured. Section 39 of that Statute enacted that the policy shall be void if it be alienated by insolvency or otherwise, and shall be surrendered to the company to be cancelled ; but upon making application to the directors, and giving security for the payment of the premium note, the assignee may have the policy transferred to him, if the directors give their consent within thirty days. The assignee, therefore, might have had a right of action if he had done this, but not otherwise. The basis of the contract of the parties was the Statute ; if the assignee wished to avail himself of it, he had three things to do : to make application ; to give security ; and wait 30 days for the company's answer.

The first plea was consequently maintained.¹

319. Assignment of life policy without consent of beneficiary—Effect of death of beneficiary.—In so far as regards the beneficiary, the original contract is one between two parties for the benefit of a third, and the right to divest him of the benefit without his consent depends on the law of the jurisdiction in question affecting general contracts for the benefit of third parties which are unaccepted by them. The prevailing rule in the United States is that it cannot be so divested.² In other words, that the

¹ *Sanboken v. Canada Mutual Insurance Co.*, S. C. 1876, cited in II Stephens Digest, 403.

² *Central Bank of Washington v. Hume*, 128 U.S., 195 (1888).

beneficiary has a vested right, unless the right to divest has been reserved.

The right to change the beneficiary in policies coming under the operation of the different Canadian provincial Acts governing insurance for the benefit of wives and children, is regulated by these acts, and has been fully dealt with in Chapter VIII. of this work.

The effect of the death of the beneficiary depends on whether he has a vested right or not. If he has, it passes of course to his heirs. The United States decisions are contradictory as to whether the wife beneficiary must survive her husband in order to benefit.¹

It has been held in Ontario, that the beneficiary's interest ceases.² And this is the law in Quebec.³

320. Transfer of life policy—Executor cannot claim until transferee's claim is settled—Incomplete transaction.—In a case where plaintiff as executor to a deceased person, whose life had been insured, is unable to surrender the policy of insurance to the insurance company, inasmuch as said policy had been transferred to cover all advances then made and which might thereafter be made by a third party, he can have no right to claim the benefit of said policy so long as the claim of such third party in possession of said policy remains in dispute and unsettled.⁴

And where a person insured his life and signed a document, directed to the managers of the insurance company, in these words: "I give and bequeath to — the amount stated on the policy given on my life by the S. Life Ins. Co., to be paid to none other unless at my request dated later," and after showing or reading the policy which he retained, he handed the document to the plaintiff remarking: "There, that is as good as a will;" it was held, that on account of its incompleteness, the transaction was not a gift or a declaration of trust, as the trust intended was not irrevocable nor could the paper take effect as a will.⁵

¹ See cases in *Clarke on Life Ins.*, § 76—Wife's interest ceases. *Tompkins v. Levy*, 87, Ala. 263, (1888). See also *Clark v. Allens*, (1877), 11 R. J. 430, and cases cited there, for American decisions on assignability of life policies.—*Hill v. United Life Ins. Ass.* (1893), 154 Pa. St. 29, for a case of tontine insurance in form of a trust assignment for mutual benefit.

² *Wicksteed v. Munro*, 13 A. R. 486, (1896).

³ R. S. Q. art. 5592.

⁴ *Conway v. Britannia Life Ass. Co.*, 8 L.C.J. 162.

⁵ *Kreh v. Moses*, 22 O.R. 307.

321. Surrender of life policy obtained by alleged fraud.—In a very recent Ontario case, the surrender of a policy was attacked by the insured's executors on the ground that it had been induced by the fraud and false representation of the insurer. It was contended, that the insured was at the time of the transaction under the delusion that he would live a long time, and that the defendants permitted him to remain under that delusion, knowing that he could not recover, and that this was such fraud as avoided the transaction, but the court refused to set the surrender aside.¹

¹ *Potts v. Temp. & G. L. Ass. Co. of N. A.*, 23 O.R. 73.

CHAPTER XIII.

AGENTS—THEIR POWERS AND DUTIES.

322. GENERAL REMARKS ON THE POWERS AND DUTIES OF AGENTS.

323. EFFECT OF ERRORS, MISDESCRIPTION AND CONCEALMENT, ETC., ON THE PART OF AGENTS IN FILLING UP APPLICATIONS OR MAKING DIAGRAMS — EFFECT OF INSTRUCTIONS TO AGENT ERRONEOUSLY DELIVERED.

324. GENERAL AGENT HAS NO POWER TO DELEGATE HIS FUNCTIONS; INTERIM RECEIPT ISSUED BY SOLICITING AGENT NOT BINDING—AGENT HAS NO POWER TO VARY OR WAIVE CONDITIONS.

325. EFFECT OF NOTE GIVEN TO AGENT IN PAYMENT OF PREMIUM.

326. AGENT GRANTING INSURANCE IN HIS OWN FAVOR.

327. CUSTOM OF AGENTS TO GIVE EACH OTHER CREDIT FOR REINSURANCES.

328. PRINCIPAL AND AGENT.

329. AN ENGLISH DECISION AS TO KNOWLEDGE OF AGENTS.

330. RECENT AMERICAN DECISIONS ON THE POWERS AND DUTIES, ETC., OF AGENTS—POWER TO WAIVE — KNOWLEDGE OF AGENT—ACTION FOR RECOVERY OF PREMIUMS ON ACCOUNT OF INSOLVENCY OF COMPANY HAVING BEEN KNOWN TO AGENTS—ACTS AND KNOWLEDGE, ETC., OF AGENTS' CLERKS; DELEGATION OF POWER—FALSE ANSWERS INSERTED, AND FRAUDULENT OR ERRONEOUS STATEMENTS MADE BY AGENT — AGENTS' POWER REGARDING PROOFS OF LOSS, ETC.

331. LIABILITY OF AGENTS' BONDSMEN.

322. General remarks on the powers and duties of agents.
—The large powers given to insurance agents in the United States, where in many cases they represent their companies for all the purposes of an insurance business, and can therefore bind them to an almost unlimited extent within the scope of such business, have caused the American cases to be considered unsafe guides in England, where powers of a much more limited character are given to the local agents of insurance companies.¹

In Ontario, Manitoba and British Columbia, by statutory condition, any officer or agent of the company who assumes on behalf of the company to enter into any written agreement relating to any matter connected with the insurance, is deemed *prima facie* to be the agent of the company for that purpose, but no condition of the policy either in whole or in part shall be deemed to have been waived by the company unless the waiver is clearly expressed in writing signed by an agent of the company.²

¹ Western Ass. Co. v. Provincial, 26 Grant (U.C.) 561.—Porter's Laws of Ins. 412.

² See *supra* § 248.

It may be said, generally, that the local agent of an insurance company must be treated as their officer to communicate with persons effecting insurances, and what he says or does in that capacity, within the proper bounds of his authority, must be held binding on the company.¹

Agents for insurance offices are no otherwise considered in law than those for other commercial parties, and their acts allowed by their principals cannot be set aside upon the arbitrary refusal of the principal to carry them out.²

The current of Canadian decisions has been to hold, that knowledge of material facts by the agent is the knowledge of the company.³

But, if the application states that the filling up of the application by the company's agent makes him to that extent the agent of the insured, the company is not stopped from setting up the defence of misdescription, by reason only of the misdescription arising from the agent's error.⁴

It has been decided, however, that where an application is accepted by the company, but the premium only credited to the agent in the books of the applicant, the company cannot be made to issue a policy or pay on the footing of its issue, if prepayment of premium is essential and there be no proof that credit was intended.⁵

And the sending of a receipt by the agent, without actual reception of the money, will not complete such a contract. The receipt is a "mere acknowledgment in abeyance."⁶

It may well be implied that general agents in Canada of foreign insurance companies have, as part of their general authority, power to appoint local agents with authority to sign interim receipts, in accordance with the usual course of insurance business as carried on in this country.⁷

¹ Badgley, J., in *Goodwin & The Lancashire Fire & Life Ins. Co., Q.B.*, 1873. 18 L.C.J. 7. ² *Penley v. Beacon Ins. Co.*, 7 Grant (U.C.) 130.

³ *Liverpool etc. v. Wyld*, 1 S.C.R. 604. *McQueen v. Phoenix*, 4 S.C.R. 660. *Gouinlock v. Man. & Merchants Mut. Fire Ins. Co.*, 43 U.C.R. 563. *Naughton v. Ottawa Ins. Co.*, 43 U.C.R. 121. *Brogan v. Man. & Merchants Mut. Fire Ins. Co.*, 29 C.P. 414. *Brown v. Ottawa*, 42 U.C.R. 282. *Sinclair v. Canadian Mut., U.C.R.* 206. *Ashford v. Victoria Mut.*, 20 C.P., 434. *Dear v. Western*, 41 U.C.R. 553 at 561. *Parsons v. Queen Ins. Co.*, 43 U.C.R. 271.

⁴ *Sowden v. Standard Fire Ins. Co.*, 5 A.R. 290. *Compton v. Mercantile Ins. Co.*, 27 Gr. 334. *Shannon v. Hastings Mut.*, 2 S.C.R. 394, but see *Lyon v. Stadacona Ins. Co.*, 44 U.C.R. 472, & *Quinlan v. The Union Fire Ins. Co.*, 8 A.R. 876, and see *supra* chap. X. ⁵ *Walker v. Provincial*, 7 Grant (U.C.) 137, 8 Grant (U.C.) 217.

⁶ 8 Grant (U.C.) 219, *Robinson, C.J.*

⁷ See dictum of *Strong, J.*, in *Summers v. Comm'l Union Ass. Co.*, 6 S.C.R. 27.

In one case it was held, where a clerk of the insurance company gave a receipt for the premium, that the company were bound though no policy had issued.¹

There is authority for saying, that the communications between the insurers and their agents are privileged, if they form part of the preliminary investigation of the insurers made with reference to the case after the loss.²

And the English companies doing business in Canada make it a practice to stipulate that such communications are confidential and privileged.³

Many decisions indirectly passing upon the powers of agents will be found in other chapters of this work.⁴

It is said in the United States, that it is well, in considering the extent of an agent's authority, to look to his relations to the company in point of place. If he is remote, his usefulness and efficiency might be impaired if he were obliged to refer all questions to head office; it is fair to presume that a more liberal exercise of discretion is permissible to him than to an agent having the same general powers, but residing so near to his principal that reference may be practicable and consistent with the success of the agency.⁵

Our own Supreme Court has strictly examined and on the facts rejected a claim based upon an interim receipt issued by a broker acting for the company's agent without the company's authority. And this ruling has been followed in a very recent Ontario case.⁶

Delivery to local agents of notice of fire is sufficient within a condition requiring notice to the company, unless the policy otherwise stipulates.⁷

An agent cannot waive a forfeiture in the face of a condition in the policy that it shall not attach until the premium is paid, and that only the president or secretary should waive a forfeiture.⁸

¹ *Paré v. Scott. Imp. Ins. Co.*, S. C. 1879, 2 Stephen's Digest 410; *Duval v. Northern Ass. Co.*, S. C. 1877, *ib.*

² *Pac. Mut. Co. v. Butlers*, 17 L.C.J. 309; *Grant v. Aetna Co.*, 11 L.C.R. 128.

³ See *supra* § 260. ⁴ *Vide index* vo. Agents.

⁵ *Ins. Co. v. Wilkinson*, 13 Wall (U.S. 222); *Eames v. Home Ins. Co.*, 94 U.S. 621.

⁶ *Summers v. Comm'l Union Ass. Co.*, 6 S.C.R. 19, referred to *infra*, and *Cosgrove v. Keystone F. Ins. Co.*, decided at Toronto, 7th Jan., 1897, not yet reported.

⁷ *Peppitt v. North B. & Mer., Riess & Gedd* (Nova Scotia) 219.

⁸ *Calhoun v. Union Mut.*, 3 Pugs. & Burb. (New Brunswick) 13, 23. *Jacobs v. Equitable* 17 U. C. (Q.B.) 35, 19 do. 250.

In the recent American case of *Hardwick v. State Ins. Co.*,¹ the court followed the usual rules as to agent's authority and the right of the assured to assume that, in the absence of knowledge to the contrary, acts and declarations of the agent are as valid as if they proceeded directly from the company; and the cases quoted by the court are to the same effect.²

An agent authorized to issue policies binds the company by all waivers, representations or other acts within the scope of his business, unless the insured has notice of a limitation of his powers.³ The question in issue is not only, what power the agent did in fact possess, but what power the company held him out to the public as possessing.⁴ A provision in the policy, that agents are only authorized to collect renewal premiums upon receipts furnished and signed by the president and secretary, is notice of such limitation of the agents powers;⁵ so is a provision in a policy that they cannot waive any of its conditions;⁶ but a notice, printed on the back of a policy, that payment to an agent will not be valid without the production of a receipt, is not.⁷

There is a noticeable tendency in the reported cases to extend rather than restrict the power of the agents to bind the company by their acts in connection with the contract.⁸

A distinction is made in the cases between the authority of general and special agents, and it is held, that the power of a general agent is plenary as to the amount and nature of the risk, the rate of premium and, generally, as to the terms and conditions of the contract, and he may make such erasures, explanations, memoranda and endorsements and give such advice and information modifying

¹ 20 Or. 547 (1891).

² See also *Westend Hotel & Land Co. v. Am. Fire Ins. Co.*, 25 Ins. L. J. 854 (1896) and *Roberts et al v. North Western Nat. Ins. Co.* (Wis. S. C.), 62 N. W. Rep. (1895) 1048.

³ *Ins. Co. v. Barnes*, 41 Kan. 161, agent misstated title in the application, being informed of the facts.—*Ins. Co. v. Hogue*, 41 Kan. 524, renewal in an unauthorized manner.—*Phoenix Ins. Co. v. Spiers*, 87 Ken. 286.

⁴ *C. C. L. C. 1730. Eclectic Life Ins. Co. v. Fuhrenkrug*, 64 Ill. 463 at 467.

⁵ *Merseran v. Phoenix Mut. Life Ins. Co.*, 66 N. Y. 274. *Catoir v. Am. Life Ins. Co.*, 33 N.J. 487.

⁶ *Green v. Lycoming Fire Ins. Co. (Pa.)* 9 Ins. L.J. 811. *Clevenger v. Mut. Life Ins. Co. (Dak.)* 9 Ins. L. J. 129.

⁷ *McNeilly v. Continental Life Ins. Co.*, 66 N. Y. 23.

⁸ *Williams v. Can. Mut. Fire Ins. Co.*, 27 U. C. C. P. 119. *Benson v. Ottawa Agric. Ass. Co.*, 42 U. C. (Q. B.) 282. *Wyld v. London etc. Ins. Co.*, 23 Grant Ch. (U.C.) 442. *Hastings Mut. Fire Ins. Co. v. Shannon*, 2 S. C. R., 394. *Kreutz v. Niagara Dist. Mut. Fire Ins. Co.*, 16 U. C. (C.P.) 131, and see also *Chatillon v. Can. Mut. Fire Ins. Co.*, 27 U. C. (C. P.) 450. *Somers v. Athenæum Fire Ins. Co.*, 9 L.C.R., 61. *Davis v. Scottish Prov.*, 16 U.C. (C.P.) 176.

or limiting the general provisions of the policy and even inconsistent therewith, as in his discretion seems proper, before the policy is delivered and accepted or even after, if this be his habit known to the office.¹

The agent dismissed, owing to a legal dissolution or winding up of the company, cannot claim damages.² He takes the risk of any act or neglect of the other officers of the company that may cause dissolution.

When a person is in fact the agent of the company in procuring a policy, a clause in the policy, that persons so acting are agents of the insured, does not change the fact. He is still the agent of the company as to the acts which are done in its behalf.³

But where the policy provides not only that the agent shall be deemed the agent of the applicant and not of the company, but further that the company will not be bound by anything said by the agent, not contained in the application, the Ontario courts have held the clause effective.⁴

Though parol proof is inadmissible to vary the terms of a written contract, it is admissible to show that the contract is not the one made by the party. It might be admitted to show that the agent did not correctly take down the insured's answers, that the application is not the instrument of the insured, and generally to prove that the minds of the parties never met on the contract as set down in the policy and application.

To avoid the contract and resist payment of premiums, there is no doubt, says May, the insured should be allowed to do this; but when the demand is not only to declare the supposed contract off, but to substitute a new one, holding the company to a risk it did not understand, which fact the insured had easy means of

¹ See cases cited in May 225, note 1, and also *Van Allen v. Farmers' Joint Stock Ins. Co.* 4 Hun. 413. *Ins. Co. v. Tullidge*, 39 Ohio, St. 240, and *infra*, and *Pitney v. Glens Falls Ins. Co.* (1875), 65 N.Y. 6. See also *Am. Law Reg. and Review*, Oct. 1895, 2 N. S. 654, for a leading article on "Authority of an insurance agent" by W.C. Rodgers; and *Taylor v. State Ins. Co.*, 67 N.W. Rep. 577 (1896), as to authority of agent to correct a policy issued by him.

² *People v. Globe Mutual Life Ins. Co.*, 91 N.Y., 174, 179, 181.

³ *Naughton v. Ottawa Agr. Ins. Co.*, 43 U.C. (Q.B.) 121. *Wyld v. London etc. Ins. Co.*, 23 Grants Chy. 442 (U. C.) *Benson v. Ottawa Agr. Ins. Co.* 42 U. C. (Q. B.) 282. *Union Mutual Life Ins. Co. v. Wilkinson*, 13 Wall 222. *Com. Fire Co. v. Ives*, 56 Ill. 403.

⁴ *Moore v. Com. Mut. Fire Ins. Co.*, 41 U.C. (Q.B.) 497. *Johnston v. Niagara Dist. Mut. Ins. Co.*, 13 U.C. (C.P.) 331. *Bleakley v. Niagara Dist. Mut. Ins. Co.*, 16 Grant (U. C. Ch.) 198 and *supra* § 256.

knowing, then the question is not one of the admission of parol to show that a different contract was actually made, but to show that the minds of the contracting parties never met at all. This is, of course, where the agent is only a solicitor and forwarder. It seems impossible to deduce from the jurisprudence any certain rule on this point. On the one hand, the courts are reluctant to hold the company on a contract it never made; on the other, we have the fact that the company invites the public to deal with its agents in the customary manner, and it knows that it is usual to rely on agents. The amount of litigation on the subject being sufficient proof of the frequency with which men trust them, has been held sufficient to justify decisions against the company in the United States, in those cases where the agent's negligence is proved. Perhaps the company should fairly be held liable to the extent of the premium and interest.¹

The true rule would seem to be that, where there is no usage or special evidence to the contrary, such as evidence of connivance by the company, impossibility or improbability of discovering the error or saving the fraud, even if the paper had been read and due care exercised, advice or assurance of the agent and acts equivalent thereto, that the assured could not be expected to know were not proper and in good faith, a usage to let the agent make surveys on his own responsibility, etc., a person is bound to know what he signs, and if by lack of ordinary care, as by not reading the paper, he misleads the company, he ought not to throw the loss upon it, and should have no more than his premiums and interest. If he acted in bad faith, he should have nothing, but if he acted in good faith and with ordinary care, the company should bear the burden of its agent's acts and omissions.²

Where the agent making out the application is not the recognized agent of the company, of course he acts only for the insured, and the latter is bound by his acts.³

The decisions of the courts of Massachusetts and Rhode Island appear to go to such an extreme length that they should be accepted with caution. They have repeatedly held, that even where the

¹ May, 144 G.

² May, 144 G. and see *Martin v. Mut. Fire Ins. Co.*, 3 Pugsley N.B. 157. *Dingee v. Agricultural Ins. Co.* id. 80. *Kennedy v. do.* 1 R.S.C. (Nova Scotia) 433. *Billington v. Prov'l Ins. Co.*, 3 S.C.R. 182. *Watkins v. Rymill* 10 Q.B.D. 178, 52 L.J. Q. B. 121, 43 L.J. N.S. 426, 31 W.R. 337. *Fowler v. Scottish Equitable* 23 L. J. Ch. 225.

³ *Foot v. Aetna Life Ins. Co.* 4 Daly 285.

insurers themselves had knowledge of and assented to the fact in question, it was a good defence to the claim of the assured.¹

Mutual insurance is essentially different from stock insurance, its original design being to provide cheap insurance by means of local associations, the members of which should insure each other. Such associations were, in their nature, adapted only to local business. They needed many by-laws and conditions not required in stock companies, and it was necessary and equitable that each person who was insured in them, should become subject to the same obligations towards his associates that he requires from them towards himself. If the officers had discretionary power as to the terms of the contract, or even as to its form, it is obvious that different parties might become members upon different terms and conditions, and thus the principle of mutuality would be completely abrogated.²

The authorities, therefore, seem to restrict the powers of officers of mutual companies in the matter of waiver to such as merely relate to collateral matters, as proofs of loss, etc., and deny them authority to waive express stipulations of their policies or by-laws which relate to the substance of the contract.³

The subject of the authority of agents of mutual insurance societies has also been dealt with in *Protection Life Ins. Co. of Chicago v. Foote* (1875), 79 Ill. 361, where the question arose on a post office money order, obtained by the assured in due time for the payment of premium, but which did not reach its destination before the expiry of the time of grace.

It has been held, that an agent, having general authority to insure the property of his principal, has no authority to effect an insurance in a mutual company whereby he makes his principal an insurer of others.⁴

The question, whether the person procuring the application is the agent of the assured or of the company, has very often been ventilated in the United States courts. On this subject there have been a number of recent decisions.⁵

¹ *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175.

² *May*, 146. ³ *Beach*, 791. ⁴ *White v. Madison*, 26 N. Y. 117.

⁵ *Coles v. Jefferson Ins. Co.*, 25 Ins. L. J. 247 (1896); *Bernard v. United Life Ins. Ass'n*, 33 N. Y. Suppl. (1895) 22, 66 N. Y. St. Rep. (1895) 521; *Davis v. Grand Rapids F. Ins. Co.*, 36 N. Y. Suppl. 792 (1896); *American F. Ins. Co. v. Brooks et al.*, 34 Atl. Rep. 373 (1896); *Sellers et al. v. Comm'l F. Ins. Co.*, 24 Ins. L. J. (1895) 354; and it was decided in *Brit. Am. Ass. Co. v. Cooper*, 40 Pac. Rep. (1895) 147, that a contract of insurance, entered into by one acting as agent for both the company and the insured, may be avoided by either party, if, at the time of the contract, he did not know of such person's agency for the other party, or had not, with a full knowledge of the facts, ratified it.

Disputes have repeatedly arisen as to the sufficiency of evidence to establish the fact of agency.¹

"Attorneys" in a Lloyd's policy has been held to mean "agents."²

Where an insurance agent agreed with a person to look after his risks in the company he represented and in others and reported lists to him, showing the amount of his insurances therein and giving him a receipt for money advanced to pay premiums, these lists were held inadmissible in an action against the agent's company to show any recognition of the policy.³

And where the same person is at once agent for the policy holder and the company, the former is bound by a notice to the agent of the cancellation of his policy.⁴

Persons dealing with insurance companies will be deemed to have notice of the powers of their managers, whatever the mode in which the company is constituted, so far as the constitution of the company defines and limits the same. But merely directory provisions therein, which are only for the guidance of the directors, do not concern and will not affect persons dealing with the company.⁵

And it seems good law that the powers of a general agent are *prima facie* co-extensive with the business entrusted to his care and will not be narrowed by limitations not communicated to the person with whom he deals.⁶

A general agent with unlimited powers may waive conditions of policies, such as that suit shall be brought within a certain time after loss.⁷

It has been said in the United States that, generally, agents of insurance companies authorized to contract for risks, receive and collect premiums and deliver policies, may confer upon a clerk or subordinate authority to exercise the same powers, and that the

¹ *Lanck v. Myers*, 53 Legal. Intell. 266 (1896); *Rahr et al. v. Manch. F. A. Co.*, 25 Ins. L.J. (1876) 750; *Dickerman v. Quincy Mut. F. Ins. Co.*, 32 Atl. Rep. (1895) 499. See also *Bernheimer v. City of Leadville* (1890), 14 Colo. 518, where a person was held not to be amenable to a license tax as an "insurance broker," although he had been commissioned by a company to act as their agent.

² *Walker et al. v. Beecher*, 36 N. Y. Suppl. 470 (1896).

³ *Hartford F. Ins. Co. v. Reynolds*, 33 Mich. 502 *seq.*

⁴ *Ib.*

⁵ *Porter's Laws of Ins.*, 409.

⁶ *Shannon v. Gore Dist. Mut.*, 2 U.C. App. 396. *Hastings Mut. Co. v. Shannon*, 2 S.C.R. 394.

⁷ *Brady v. Western Ass. Co.*, 17 U.C. (C.P.) 597.

service is not of such a personal character as to come under the maxim "*delegatus non potest delegare.*"¹

But as we have seen, the Supreme Court of Canada have not accepted this view in its entirety, but have considered rather that the agent cannot delegate his authority, as confidence has been reposed in him personally.²

The authority of a general agent is restricted to the range of his employment, and to the acts and representations which a prudent and ordinarily sagacious and experienced person (with no reason to suspect otherwise) might expect him to do or to be authorized to make, in respect of the particular business entrusted to him. It would not be expected that an insurance agent would be authorized to receive a chattel in payment of a premium, or to discharge his own indebtedness to the assured through it, for this would be travelling out of the usual course of business. But there is nothing in the course of business (or in the nature of the contract) to make it unreasonable to take a premium note.

The mere fact that the agent was going contrary to instructions, does not prevent the inference that the transaction amounted to payment, although it is a circumstance fairly to be considered in determining whether such inference ought in fact to be drawn.³

The manner of conducting the business of insurance is so well known, that a person may reasonably assume that one having the apparent power of a general agent is not limited by his instructions as to the class of risks he may insure. Persons dealing with such agents in good faith have the right to assume, that they possess the power usually exercised by that class of officers, and unless the limitation on their authority is brought to their knowledge, the contracts made with them will be binding upon the company.⁴

A universal agent is one authorized to transact all the business of his principal of a particular kind or in a particular place. A special agent is one authorized to act only in a specific transaction.⁵

¹ Krumm v. Ins. Co., 40 Ohio St. 225; Kuney v. Amazon Ins. Co., 36 Hun. 66; Equitable Life Ass. Co. v. Probst, 18 Neb. 526, 528; Continental Ins. Co. v. Ruckman, 127 Ill. 364.

² Summers v. Comm'l Union Ass. Co., 6 S.C.R. 19.

³ King, J., in The Manufacturers' Accident Insurance Company v. Pudsey, 27 S.C.R. 379, 381, reported *infra* § 325.

⁴ Ruggles v. Am. Central Ins. Co. of St. Louis (1899), 114 N.Y. 415.

⁵ Mechem on agency cited in South Bend Toy Manuf. Co. v. Dakota F. & M. Ins. Co., (80 Dak. 1892), 52 N.W. Rep. 866. See also Goode *et al.* v. Georgia Home Ins. Co., 23 S. E. Rep. 744 (1896) and Hartford Fire Ins. Co. v. Orr, 56 Ill. App. 620.

There does not, however, appear to be any fixed rule regarding the use of the various adjectives, "universal," "general," "special," "local," etc., at least as far as the power of the agent is concerned; in many cases it is a distinction without a difference, and the word "special" is often added in a mere titular sense.

323. Effect of errors, misdescription and concealment, etc., on the part of agents in filling up applications or making diagrams—Effect of instructions to agent erroneously delivered.

—The Canadian courts have frequently been appealed to to settle disputes between insurance companies and the insured, originating in the agents having misstated or concealed, either intentionally or through carelessness, certain facts which the companies considered sufficiently material to invalidate the contract, and the cases cited hereunder will show the tenor of judicial opinions in this respect.¹

Thus it was decided in one case, that the error of an insurance company's agent, in making and transmitting to the head office a diagram of the buildings insured, by means of which the buildings are described in the policy as "detached" instead of "connected with other buildings," cannot deprive the assured of his remedy on the policy, and to a plea setting up that the policy was obtained by false and fraudulent representations as to the building being "detached" and as to the number of its occupants, and that thereby the conditions of the policy were broken and the plaintiff deprived of all benefit under it, the plaintiff was held entitled to answer denying such misrepresentations and alleging the visits of the insurance company's agent to the insured premises and his doings as to the making and transmitting of an erroneous diagram.²

And in another case, where an insurance policy described the goods insured as "stock consisting of dry goods, etc., while contained in that one and a half storey building occupied as a store house, said building shown on plan on back of application as 'feed house' situate attached to wood shed of assured's dwelling-house," the plan referred to had been made by a canvasser for insurance, who had obtained the application, and the building on said plan marked 'feed house,' did not in any respect conform to the description in the policy, but another building thereon answered the

¹ See *infra* § 330 for American decisions.

² *Somers v. Athenæum Fire Ins. Co.*, 9 L.C.R. 61.

description in every way except as to the designation 'feed house.' The goods insured were stored in this latter building and were burnt.

The company refused to pay, alleging breach of a condition in the policy that no inflammable materials should be stored on the said premises, as well as misdescription of the building containing the goods insured. In an action on the policy it appeared, that a barrel of oil was in the building marked 'feed house' at the time of the fire. The jury found a verdict for the plaintiff and a non-suit, moved for pursuance to leave reserved was refused by the full court (the Supreme Court of New Brunswick).

It was decided, that the non-suit was rightly refused ; that it was evident, that the building in which the goods were stored, was that intended to be described in the policy ; that the building marked 'feed-house' being detached from that in which the goods were, was a suitable place for storing oil which, therefore, was not a breach of the condition ; that the case was a proper one for the application of the maxim "*falsa demonstratio non nocet*," but if not, the matter was one for the jury who had pronounced upon it.

It was decided further, that the canvasser who received the application could not be regarded as agent of the assured, but was the agent of the company which was bound by his acts.¹

In the application for a policy of insurance against fire it was stated, that there was no encumbrance. The application was filled in by the company's agent. The insured informed him of the existence of a mortgage on the property, when the agent told plaintiff that, if there was nothing overdue thereon, it was not an encumbrance, and, under this belief, there being nothing overdue, the statement was made. A policy was afterwards issued with conditions and variations.

The fourteenth variation was, that if any agent, etc., of the company shall have written or filled up any part of the application, he shall for that purpose be deemed the agent of the insurer and not of the company ; and no statement, written or verbal, made to such agent, etc., as to any matter to which the enquiries in the application extend, should bind the company or affect the company with notice thereof unless stated in the application.

¹ Supreme Court of Canada, *Guardian Ins. Co. v. Connely*, 20 S.C.R. 208.

The fifteenth variation was, that any fraudulent misrepresentation contained in the application, or any false statement therein respecting the title or ownership of the applicant or his circumstances, or the concealment of any encumbrance, or the failure to notify the company of any mortgage or encumbrance upon or other change in the title or ownership of the insured property rendered the policy void :—The court declared (Galt, J., dissenting), that the defendants were estopped from setting up the avoidance of the policy. *Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P. 450. and *Hastings Mutual Fire Ins. Co. v. Shannon*, 2 S.C.R. 394, followed.

Per Galt, J.—That irrespective of the agent's representation before the issue of the policy, the plaintiff after the issue thereof should, under the fifteenth variation, have notified the defendants of the mortgage.

Per Rose, J.—The fourteenth variation was unjust and unreasonable on the facts of the case, and possibly generally; and the fifteenth variation did not apply; but, even if applicable, it was similar in terms to section 36 of 36 Vict., c. 44 (Ont.) which was considered in *Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P. 450.

Per Cameron, C. J.—Whether the fourteenth variation was or was not just and reasonable, need not be considered, for it did not profess to provide that the company should not be bound by the agent's representation as to the meaning and effect of the questions in the application; and as to the fifteenth variation, it was competent for the parties to define, what they understood was meant by encumbrance.¹

In another case, it was provided by one of the conditions in the policy sued on, that if anyone should insure his building or goods and cause the same to be described otherwise than they really were, to the prejudice of the company, or should misrepresent or omit to communicate any circumstance which was material to be made known to the company in order to enable them to judge of the risk, such insurance should be void.

The plaintiff signed a printed form of application in blank for an insurance on a block of five buildings and told defendants' agent to make his own measurements and description. The agent

¹ *Graham v. Ontario Mutual Ins. Co.*, 14 O.R. 358.—C.P.D.

filled up the application from an examination and diagram, which he had made on a previous occasion, and in answer to the question "is there any other fact or circumstance affecting the risk with which it is necessary that the company should be made acquainted," replied "No, it is a first-class building in every respect; although one roof covers all, there is a solid fire brick wall between each store."

The application contained an agreement that, if the agent of the company filled up the application, he should in that case be the agent of the applicant and not of the company. There was not a solid brick wall between the stores, and the jury found, that this was a misdescription of a fact material to the risk :—

It was decided, that the plaintiff could not recover.¹

Where the agent of an insurance company filled in an application for insurance on a building built of boards and fixed a premium at the rate demanded on brick buildings, there being no tariff for value for board buildings, the word "boards" was so badly written that it was difficult to decipher it, but the character of the building was designated on a diagram on the back of the application, which the agents were instructed to mark with red in case of a brick, and black in case of a frame building. In this case it was in black. At the head office the word intended for "boards" was read "brick" and the policy issued as on a brick building.

A loss having occurred, the company, under a clause in the policy, caused an arbitration to be had, but afterwards refused to pay the amount awarded to the insured, claiming that by reason of the error in the policy there was no existing contract of insurance.

The Supreme Court affirmed the judgment of the court below, that, as there had been no misrepresentation by the assured and no mutual mistake, the parties were *ad idem* and the contract was complete, and, even if it were otherwise, the company could not set up this defence after treating the contract as existing by the reference to arbitration under the policy.²

The effect of not mentioning a coal oil shed, when applying for fire insurance, was discussed in *Quinlan v. Union Fire Ins. Co.*³ The circumstances leading to this action were these :—The first

¹ *Sowden v. Standard Fire Ins. Co.*, 5 A.R. 290.

² *Supreme Court of Canada, The City of London Fire Ins. Co. v. Smith*, 15 S. C.R. 69. ³ 8 A. R. 376.

statutory condition endorsed on the policy provided that, if the insured misdescribed his buildings or goods to the prejudice of the company, or misrepresented, or omitted to communicate any material circumstance, the insurance relating thereto should be void.

The second statutory condition provided, that the policy was intended to be in accordance with the application, unless the company should point out the difference relied on, with a variation added thereto that such application or any survey, plan, or description of the property to be insured, should be considered a part of the policy and every part of it a warranty by the insured, but that the company would not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection.

The twentieth statutory condition, as varied, provided that, in case any agent of the company took part in the preparation of the application, he should, with the exception above provided in case of a diagram or plan, be regarded in that work as the agent of the applicant.

By the application, which was signed not by the applicant in person, but through the agent of the company, the insured was required to make known the existence of all buildings within 100 feet of the insured premises, and it appeared that the insured had omitted to make known the existence of a small building used for the storing of coal oil and material, within such distance, but of the existence of which the applicant was not at the time aware.

A diagram was made and filled in by the agent and signed by him in his own name as well as that of the applicant, which contained no reference to this building. The diagram was not made from a personal inspection at the time, but from previous inspection and the knowledge thereby acquired, as also an intimate knowledge of the property which he passed three times each day, and the agent, at the foot of the application, stated that he had made a personal survey of the risk :—

The court decided, reversing the judgment of the court below, (31 C. P. 618), that, under the conditions and circumstances above set forth, the insured was relieved from the effect of his omission to make known the existence of such coal oil shed ; that the inspection by the agent need not be one made for the purpose of such insurance, provided a personal inspection did take place ; and that, under the facts and circumstances appearing in the case, the company could not dispute the correctness of the answers given by

insured, whether his answers upon the application for insurance were to be treated as warranties or representations only.

Inaccuracy in stating measurements on the diagram was the cause of another action in Ontario, decided ultimately by the Supreme Court of Canada in favor of the assured. In this case,¹ C. M., appellant's agent, solicited and prevailed on T. S. to insure his premises with the appellants. Previously he had examined the premises to be insured, and on the 22nd April, 1874, T. S. signed the application which C. M. had caused to be filled up and upon the back of which was a diagram purporting to represent the exact situation of the building in relation to adjoining buildings. T. S. stated at the time of signing the application, that the distances put down in the diagram were not accurate. C. M. promised he would go to the property and make an accurate measurement of the distances. By one of the conditions of the policy it was provided, that, if an agent should fill up the application, he should be deemed to be the agent for that purpose of the insured and not of the company, but the company would be responsible for all surveys made by their agents personally.

The Supreme Court affirmed the judgment of the Court of Error and Appeal, that, with respect to the survey, description and diagram, the assured was dealing with C. M. not as his agent, but as the agent of the company, and that therefore any inaccuracy, omissions, or errors therein, were those of the agent of the company, acting within the scope of his deputed authority, and not of the assured.

In *Provincial Assurance Co. v. Roy* ² the company pleaded, that the insured had violated one of the conditions of the policy, obliging him to notify the company of any additional assurance effected on the same property. The respondent, representing the assured as assignee, answered, that the company had waived that by a settlement made through their agent.

The difficulty arose from an error in the transmission of a telegram sent by the company from Toronto to its agent at Quebec. The various companies interested were to meet and agree as to a settlement of the claims, and the company telegraphed their agent instructing him to "decline" to join in the meeting or the settlement. The telegram, by error in transmission, was made to read "decide"

¹ *Hastings Mutual F. Ins. Co. v. Shannon*, 2 S.C.R. 394.

² 10 R.L. 643, Q.B. 1879.

instead of "decline," and the agent accordingly joined in the settlement.

The court was of opinion, that the company must be bound by it, as the agent was acting within the scope of his instructions at the time.

324. General agent has no power to delegate his functions; interim receipt issued by soliciting agent not binding—Agent has no power to vary or waive conditions.—Where an action was brought on an interim receipt, signed by one S., an agent for the respondent company at L., one of the pleas was, that S. was not respondent's duly authorized agent as alleged. The general managers of the company for the province of Ontario had appointed by a letter, signed by them both, one W. as general agent for the city of L., and S., the person by whom the interim receipt in the present case was signed, was employed by W. to solicit applications, but had no authority from, or correspondence with, the head office of the company.

In his evidence S. said, he was authorized by W. to sign interim receipts, and the jury found he was so authorized. He also stated, that W., one of the joint general managers, was informed, that he (S.) issued interim receipts, and that the former said, he was to be considered as W.'s agent. There was no evidence that the other general manager knew what capacity S. was acting in. It was decided, affirming the judgment of the Court of Appeal for Ontario, that W. had no power to delegate his functions, and that S. had no authority to bind the respondent company; that the general agents, being joint agents, could only bind the respondent company by their joint concurrent acts, and the appointment of S. as agent by W., without the concurrence of the other general manager, would not have been sufficient.¹

In another Ontario case the facts were as follows :—The defendants issued a policy of insurance against fire, dated 22nd April, 1889, upon a house of the plaintiff. The application signed by the plaintiff stated, that the house was occupied as a residence by the plaintiff's son. A fire took place on the 14th November, 1889, at which date, and for six months previously, the house had been unoccupied. One of the special conditions endorsed upon the policy was that, if a building became vacant or unoccupied and so

¹ Supreme Court of Canada, *Summers v. Comm'l Union Ass. Co.*, 6 S.C.R. 19, and see *Cockburn v. British Am. Ass. Co.*, 19 O. R. 245.

remained for ten days, the entire policy should be void. The plaintiff and his wife swore that, when the agent came to him and drew the application, he asked the plaintiff if there was any one in the house at the time, and the plaintiff told him, that his son was living there at the time, but was going to leave in about two weeks, and asked if that would make any difference, and was informed by the agent that it would not. By a clause in the application, the plaintiff agreed, that no statement made or information given by him prior to issuing the policy to any agent of the defendants, should be deemed to be made to or binding upon the defendants unless reduced to writing and incorporated in the application; and on the margin of the application there was a notice, showing that the powers of agents were limited to receiving proposals, collecting premiums, and giving the consent of the defendants to assignments of policies. The court was of opinion, that the special condition referred to was not an unreasonable one, and that the agent had no power to vary it; and an action to recover the amount of the loss was dismissed. The plaintiff at the trial sought to give evidence of certain transactions between the agent of the defendants and a brother of the plaintiff, for the purpose of showing that the plaintiff, having become aware of them before the application made by him, was justified in believing, that the defendants did not regard the condition as to occupation as a material one, and it was further held, that this evidence was properly rejected.¹

And in *Baile v. Provincial Ins. Co.*,² it was decided, that an agent of an insurance company, whose powers are limited to receiving applications for insurance for transmission to the head office, and to the collecting of premiums, has no power to waive any of the conditions of the policy.

325. Effect of note given to agent in payment of premium.—In the very recent case of *Manufacturers Accident Ins. Co. v. Pudsey*,³ the company repudiated liability on the ground that the policy had expired and had not been renewed. The evidence submitted by the plaintiff showed, that the agent had requested the assured to renew the policy and had received \$1.00 in cash and a promissory note for \$15.00 for the balance of the premium, giving

¹ *Peck v. Agricultural Ins. Co.*, 19 O.R. 494—Q.B.D. See also *Moffat v. Reliance Mutual Life Ass. Co.*, 45 Q.B. 561.

² 21 L.C.J. 274 (1877). ³ 27 S. C. R. 374, referred to *supra* § 322.

a paper purporting to be a receipt. The agent's evidence, on the other hand, was to the effect that, while the note was taken for a portion of the premium, it was agreed that there was to be no insurance until the note was paid; that he gave no renewal receipt and was paid no cash. The note was never paid, but remained in possession of the agent, the company knowing nothing of it. According to the conditions of the policy no liability attached until the premium was paid, and a renewal receipt was to be printed in office form, signed by the managing director and countersigned by the agent. Instructions had been given the agents some years before this action, not to take notes for premiums, as had been the practice theretofore.

The Supreme Court of Canada affirmed the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, and decided, that the assured having no knowledge of any limitation of the agent's authority, might fairly expect that the latter had power to take a note, and the fact, that the agent disobeyed instructions, could not affect the inference that the act was within the scope of his employment.

It may be stated here, that the judgment in the case of *Fleming v. The London & Lancashire Ins. Co.*, reported *supra* § 80, and in which case also the decision turned on the effect of a note given in payment of premium, has been reversed by the Privy Council¹ since the first part of this work was put in press. There is a difference to be noted between these two cases. In *Manufacturers' Accident Ins. Co. v. Pudsey*, the note was held accepted by the agent as representative of the company and on their behalf, it being made in favor of the company, although the agent was not authorized to take such a note; while in *Fleming v. London & Lancashire Ins. Co.*, the notes were payable to the agent personally, who sent his own note to the company.

The judgment of their Lordships was delivered by Sir Henry Strong, who said:—"I see no evidence to sustain the assumption that the notes were placed in the hands of White, the company's agent, with the object of negotiating them, and paying the premium out of the proceeds, the onus of proof was upon the respondent (Fleming) to show that the premiums had been paid, and this she had entirely failed to do."

¹ 3 August, 1897, not yet reported.

326. Agent granting insurance in his own favor.—It has been held, that the agent of an insurance company cannot, without the express sanction of his principals, grant an insurance in his own favor binding on the company; and the same principle prevails in the case of a second insurance, although the prior policy had been granted with the express sanction and approval of the company.¹

327. Custom of agents to give each other credit for re-insurances.—Where the defendants executed policies acknowledging the receipt of the premiums for re-insurances, which their agent at St. John had accepted, and sent the policies to him for delivery, but afterwards, hearing that a loss had occurred and that the premiums had never been paid, they instructed him not to deliver the policies :—

The plaintiffs alleged, that it was the custom of agents to give each other credit for such premiums and to settle at the end of the month, when the balance, if any, was handed by one to the other; but no knowledge by defendants of such a course of dealing, nor such a course of dealing on the part of their agents, was proved, and it was shown that their agents had no authority to re-insure except upon payment of the premium :—

It was decided, affirming 26 Chy. 661, that the defendants were not liable; that if such a custom had been proved to exist, it would not be binding on the company, unless authorised by it, and also, that the defendants were not bound by their admission on the policy of the receipt of the premium.²

328. Principal and agent.—In the cases reported in the preceding paragraphs of this chapter the agent appeared in his quality of middleman, and the question was as to how far his acts or knowledge affected the two contracting parties. But differences have, of course, also arisen between the companies on the one part, and their agents on the other, requiring for their settlement the intervention of the courts, and these differences have mostly taken

¹ *White v. Lancashire Ins. Co.*, 27 Chy. 61.—See also *Wildberger v. Hartford F. I. Co.* (Miss. S. C.), 17 South. Rep. (1895) 282, 40 Central L. J. (1895) 442, as to agent holding goods as receiver; and *Zimmermann v. Dwelling-House Ins. Co. of Boston* (Mich. S. C.), 68 N. W. Rep. (1890) 215, agent's policy on his own property must be approved by the company before it constitutes a contract.

² *Western Ass. Co. v. Provincial Ass. Co.*, 5 A. R. 190.—In *Merchant's Ins. Co. v. Union Ins. Co.*, 58 Ill. App., 611, it was decided that parol contracts for re-insurance made by agents are valid.

the form of question of commission, termination of agency, or collection of premiums etc.

In *Rawlings v. Citizens Ins. & Investment Co.*¹ it appeared, that appellant, in February, 1869, agreed to serve respondents as manager of the life and guarantee departments of the respondents' business, at a salary of \$2,000 and a commission of ten per cent on the net balance carried over on the 31st December of each year in the life and guarantee insurance department, after payment of all losses and expenses therein, the said agreement to date from and after the first of May, 1869, with a free dwelling on the premises of the respondent. Appellant entered into the service of respondents as manager under such agreement and continued to act for them from May, 1869, to May, 1870. The appellant then contended, that the net balance in the guarantee department which should have been carried over, and upon which he was entitled to his commission of ten per cent. from the 31st December, 1869, was \$12,469.68 and in lieu the respondents erroneously made the net balance \$7,154.64, by deducting therefrom certain losses, etc.

The court decided, that he was not entitled to his 10 p. c. on accounts unsettled on the 31st December, and his claim must be reduced in proportion.²

The question whether a person may claim commission for having canvassed for a life insurance contract, finally effected by another, was discussed in an action recently decided by the Superior Court at Montreal. Here, the plaintiff was cessionnaire of one F. X. Major, who was a duly appointed agent of defendant for securing applications for membership. The terms of his agreement were, that he was to have eight dollars for each thousand dollars of insurance on the plan described. One Rasconi had been canvassed for a considerable time by Major. Finally he applied to defendant for two life policies of \$10,000 each, which application

¹ 8 R.L. 398, Q.B. 1876,

² See also *Wheatfield v. Beal*, 40 N. Y. Suppl. (1896) 700, where it was said, that an agent cannot recover commission on premiums uncollected.—*Madden v. Equit. Life Ass. Soc.* (N. Y. City Superior Court), 32 N. Y. Suppl. (1895) 752, 66 N. Y. St. Rep. (1895) 79, where agent was held to be entitled to commission, if company refused to accept the risk without any reason.—*Hale v. Brooklyn L. I. Co.* (1887), 46 Hun. 274, where agent was entitled to commission on renewals as per agreement after termination of contract by mutual consent.—*Mechanics' & Traders' Ins. Co. v. McLain*, 20 South Rep. (1896) 278, as to liability of company for discharge of agent in violation of agreement.—*Boren v. Manhattan L. Ins. Co.*, 25 Ins. L. J. (1896) 861, where it was stated, that a company is not liable to sub-agent for services rendered to general agent.

was accepted upon payment of \$160, twenty dollars to Major and the balance to defendant.

Plaintiff contended, that Major secured the application and was entitled to the balance of \$140 as his commission. Major transferred his claim to plaintiff, of which transfer defendant had due notice. Defendant appeared by counsel but did not plead; but Bessette, as general agent of the company, petitioned to be permitted to take up the instance. This he was allowed to do, and in his intervention he set forth, that he was the person who really effected the insurance and was entitled to the commission; that, nevertheless, as Major had done some work in sending Rasconi to the defendant, an offer of \$60 had been made to him, which, with the \$20 already received, made \$80, equal to one half of the commission. The offer was rejected and was renewed with the plea.

The facts were, that Major had been canvassing Rasconi for over a year, but without success. He filled up a blank application at the end of that time, which Rasconi declined to sign, but said that he would go to the head office and there get certain information. He did go to the head office and had an interview with the intervening party, but without coming to any understanding. He endeavored to secure from Bessette part of his commission. He returned again and Bessette induced him to take out the policies. The transaction was undoubtedly completed by Bessette. Under the circumstances, Bessette was not bound to make any offer to Major, and, in tendering him one half of the commission, he more than complied with the requirements of the law. The tender was declared sufficient, and for the balance plaintiff's action was dismissed.¹

A decision regarding justifiable dismissal of an agent was lately rendered in Ontario and affirmed by the Supreme Court of Canada. The case in question arose on the following facts:—By agreement in writing the plaintiffs became chief agents for Ontario of the defendants, doing ordinary accident, plate-glass and employers' liability insurance. By one clause in the agreement the plaintiffs engaged to fulfil conscientiously all the duties assigned to them, and to act constantly for the best interests of the defendants, and by another the agreement was to continue from year to

¹ Papineau v. Mut. Res. Fund Life Ass'n & Bessette, 4th May, 1897, Curran, J., not yet reported.

year, subject to termination by either party on giving three months' notice to the other. Shortly after they became agents of the defendants, the plaintiffs accepted the agency for Ontario of the Lloyd's Plate-Glass Insurance Company, and on refusing to give it up on demand of the defendants, the plaintiffs were dismissed. The court decided, that the acceptance by the plaintiffs of the agency of the rival company, by which they would be prevented from conscientiously fulfilling the duties assigned to them by the defendants, was sufficient justification for the dismissal.¹

It is a generally accepted rule, that an agent instructed to receive payment cannot accept anything but money. On this principle, therefore, and also in view of R. S. O. (1877) c. 161, s. 34, and of the fact that the renewal receipt in question contained a notice, that it would not be valid unless dated and countersigned by the agent on the day on which the money was paid, it has been ruled that, where in consideration merely of a setting off of debts as between the agent of a company and a policy holder, the former wrongfully delivered a renewal receipt to the latter, the receipt did not bind the company, and the policy lapsed.²

In an action on a joint note for balance due it appeared, that J. H. S. was a local agent for an insurance company and collected premiums on policies secured through his agency, remitting moneys thus received to the branch office at Toronto from time to time. On 1st January, 1890, he was behind in his remittances to the amount of \$1250, and afterwards became further in arrears, until on the 15th of October, 1890, one W. S. joined him in a note for the \$1250, for immediate discount by the company, and executed a mortgage on his lands as collateral to the note and renewals that

¹ *Eastmure v. Canada Accident Assurance Co.*, 22 A.R. 408, affirmed by Supreme Court of Canada, 25 S.C.R. 601.—See also *Rice v. Fidelity & Cas. Co.*, 1 Lackawanna L. N. 111, and *Karsner v. Union C. L. Ins. Co.*, 2 Ohio Decisions, 658, as to right of company to terminate agency.—*Franzen, assignee, v. Zimmer*, 35 N. Y. Suppl. 612 (1895), for termination of agency by insolvency of company, and where agent was held to have no authority to cancel policies and pay rebates.—*Burlington Ins. Co. v. Threlkeld*, 31 S. W. Rep. (1895) 205, as to binding power of agent's acts after revocation of agency without notice thereof to assured.

² *Fraser v. Gore Dist. Mut. Fire Ins. Co.*, 2 O.R. 416 Ch. D., and same holding in *Citizens Ins. Co. of Canada v. Bourguignon*, M.L.R. 2 Q.B. 22, and see as to filling up of application by agent, *Sowden v. Standard Fire Ins. Co.*, 5 A.R. 200; *Quinlan v. Union Fire Ins. Co.*, 8 A.R. 376; *Graham v. Ont. Mut. Ins. Co.*, 14 O.R. 358; and as to assent of agent to assignment, *McQueen v. Phoenix Mut. Fire Ins. Co.*, 4 S.C.R. 660; and as to notice to agent, *Billington v. Prov'l Ins. Co. of Canada*, 3 S.C.R. 182; *Klein v. Union Fire Ins. Co.*, 3 O.R. 234.

might be given, in which it was declared that payment of the note or renewals or any part thereof was to be considered as a payment upon the mortgage.

The company charged J. H. S. with the balance then in arrears, which included the sum secured by the note and mortgage, and continued the account as before in their ledger, charging J. H. S. with premiums, etc., and the notes which they retired from time to time as they became due, and crediting money received from J. H. S. in the ordinary course of their business, the note and its various renewals being also credited in this general account for cash. W. S. died on the 5th December, 1891, and afterwards the company accepted notes signed by J. H. S. alone for the full amount of his indebtedness, which had increased in the meantime, making debit and credit entries as previously in the same account.

On the 31st July, 1893, J. H. S. owed on this account a balance of \$1926, which included \$0198 accrued since 1st January, 1890, and after he had been credited with general payment there remained due at the time of trial \$1009. The note W. S. signed on 15th October, 1890, was payable four months after date with interest at seven per cent, and the mortgage was expressed to be payable in four equal instalments of \$312.50 each, with interest on unpaid principal.

The court were of opinion, Taschereau & Girouard, J.J., dissenting, that the giving of the accommodation notes, without reference to the amount secured, had not the effect of releasing the surety as being an extension of time granted without his consent and to his prejudice; that the renewal of notes secured by the collateral mortgage was *prima facie* an admission that, at the respective dates of renewal, at least the amounts mentioned therein were still due upon the security of the mortgage; that, in the absence of evidence of such intention, it could not be assumed that the deferred payments in the mortgage were to be expedited so as to be *eo instanti* extinguished by entries of credit in the general account which included the debts secured by the mortgage; and that, there being some evidence that the moneys credited in the general account represented premiums of insurance which did not belong to the debtor, but were merely collected by him and remitted for policies issued through his agency, the rule in Clayton's case as to the appropriation of the earlier items of credit towards the extinguishment of the earlier items of debit in the general account would not apply,

and there should have been a reference to the Master to take the account.

A case² lately submitted to the Supreme Court of Canada, involving the question of the right of a life assurance company to change its medical examiner, although not strictly coming under the heading of "agents" is of sufficient general interest to find a place in this chapter. The particulars are as follows :—

The medical staff of the Equitable Life Assurance Society, of Montreal, consists of a medical referee, a chief medical examiner and two or more alternate medical examiners. In 1888, L. was appointed an alternate examiner in pursuance of a suggestion to the manager by local agents that it was advisable to have a French Canadian on the staff. By his commission, L. was entitled to the privilege of such examinations as should be assigned to him by or required during the absence, disability or unavailability of the chief examiner. After L. had served for four years it was found, that his methods in holding examinations were not acceptable to the applicants, and he was requested to resign, which he refused to do, and another French Canadian was appointed as an additional alternate examiner, and most of the applicants thereafter went to the latter. L. then brought an action against the company for damages by loss of the business and injury to his professional reputation by refusing to employ him, claiming that on his appointment, the general manager had promised him all the examinations of French Canadian applicants for insurance. He also alleged, that he had been induced to insure his own life with the company on the understanding that the examination fees would be more than sufficient to pay the premiums, and he asked for repayment of amounts paid by him for such insurance.

The court decided, affirming the decision of the Court of Queen's Bench, that by the contract made with L. the company were only to send him such cases as they saw fit, and could dismiss him or appoint other examiners at their pleasure ; that the manager had no authority to contract with L. for any employment other than that specified in his commission ; and that he had no right of action for repayment of his premiums, it being no condition of his employment that he should insure his life, and there

¹ Supreme Court of Canada, *Agricultural Ins. Co. v. Sargeant*, 26 S.C.R. 29.

² *Laberge v. Equitable Life Ass. Soc.*, 24 S.C.R. 595.—And see to same effect *Carney v. N. Y. Life Ins. Co.*, referred to in 45 *Journal of Commerce*, 10.

being no connection between the contract for insurance and that for employment.

329. An English decision as to knowledge of agents.—In a recent English case,¹ where it appeared that an illiterate person, blind in one eye, had taken out an accident insurance policy which provided for the payment of £250 for, *inter alia*, the loss of one eye, and £500 for total blindness, and where the assured lost his remaining eye by an accident, the court ruled, that the agent having been aware of the applicant's physical infirmity, the company was bound thereby, and judgment was accordingly given for the full amount in favor of the assured.

330. Recent American decisions on the powers and duties, etc., of agents.—The courts in the United States are constantly being resorted to in order to determine disputes turning on the question of the relation of agents to the contracting parties and how far they are affected by acts and statements, admissions or omissions, on the part of persons authorized to, or assuming the power of, acting on behalf of the company. A reference to American cases² will show *inter alia* what questions have been submitted to the decision of the courts.

¹ Bawden v. Ldn. Edinb. & Glasgow L. Ins. Co., C.A., (1892) 2 Q.B. 534.

² National Life-Maturity Ins. Co. v. Whitacre, 43 N. E. Rep. 905 (1896), payment of premiums to agent tacitly admitted by company.—Hughson v. Hardy *et al.*, 64 N. W. Rep. 389 (1895), advance of premiums by agents not inconsistent with their duties.—First Nat. Bank of Dubuque v. Getz; Getz v. Equit. L. A. Soc. *et al.*, 64 N. W. Rep. (1895), 799, as to liability of company for default of agent in failing to return premium note upon its payment.—New Hampshire Ins. Co. v. Kennedy *et al.*, 36 S. W. Rep. (1896) 709, a note given by agent to unlicensed foreign company for uncollected premiums is void.—Benevolent Order of Active Workers v. Smith, 52 Legal Intell. (1895) 473, where the Lodge secretary has been held agent of his fraternal order.—Buick *et al.* v. Mech. Ins. Co., 24 Ins. L. J. (1895) 375, as to power of agent to accept notice of cancellation and procure substitute insurance.—Schauer *et al.* v. Queen Ins. Co. of America, 60 N. W. Rep. (1894) 994, when agent may receive notice of cancellation for assured.—Gardner v. Standard Ins. Co., 58 Mo. App. 611, when agent may not receive notice of cancellation for assured.—East Texas F. Ins. Co. v. Blum (1890), 76 Tex. 653, and case cited there, where notice of cancellation to agent was not considered notice to assured.—Kraber v. Union Ins. Co. (1899), 120 Pa. St. 8; London. Ass. Corp. v. Russell, 1 Pa. Super. Ct., 320, where agent was held liable to company for failure to cancel policy as instructed; measure of damages, and contributory negligence of company.—Lanck v. Myers, 53 Legal Intell. 266 (1896); McBride *et al.* v. Rinard *et al.*, 33 Atl. Rep. 750 (1896); Morton v. Hart (1889), 88 Tam. 427, as to personal liability of agent acting for unauthorized foreign company.—Lagroue v. Zimmerman *et al.*, 24 S. E. Rep. 290 (1896), personal liability of agents acting for an association which had no legal existence.—Banks v. Cramer, 66 N. W. Rep. (1896) 946, 3 Detroit L. N. 48, an agent acting for another must disclose his principal to escape liability for non-fulfilment of agreement.

330a. Power of agent to waive—Knowledge of agent.—

As we have seen, the conditions of a policy of fire insurance may be waived by a general agent of the company issuing the same, notwithstanding the policy provides that no agent of the company can waive any of its conditions. But to constitute a waiver of conditions as to the future use of insured premises, there must be something more shown than mere knowledge of such use on the part of the agent of an insurer. The language and conduct of the agent must be such as to reasonably imply an intention on his part to waive such conditions or to consent to such use.¹

The question of the powers of agents to waive conditions and as to how far their authority may be presumed to go, and the effect of restrictions and private instructions given to agents and not communicated to the parties with whom they deal, has been the source of much litigation in the United States. Courts have pronounced at length upon the responsibilities and capacity of both general and local agents, and although, as we have seen, these decisions cannot be taken in all cases as safe guides or precedents in Canadian cases, it may be of use to give here a brief reference to them.²

¹ *Concordia Fire Ins. Co. v. Johnson*, 45 Pac. Rep. 722 (1896), and see *Equitable Life Ass. Soc. v. Cote et al.*, 35 S. W. Rep. 720 (1896).

² *Terry v. Provident Fund Soc. of New York*, 41 N. E. Rep. (1895) 18; in re Dobbels' estate, 38 Pac. Rep. 87 (1894); *Am. Employers' Liab. Ins. Co. et al. v. Fordyce et al.*, 36 S. W. Rep. 1051 (1896); *Croft v. Hanover Ins. Co. et al.*, 21 S. E. Rep. (1895) 854; *Pythian Life Ass'n v. Preston*, 25 Ins. L. J. (1896), 502, *Farnum v. Phoenix Ins. Co.* (1890), 83 Cal. 246, as to power of agent to waive prepayment of premium.—*Smith v. New England Mut. Life Ins. Co.*, 63 Fed. Rep. (1894), 769; and *Hawley v. Michigan Mut. Life Ins. Co.*, 24 Ins. L. J. (1895), 216, where policy was held void, premium not having been paid.—*Long Island Ins. Co. v. Great Western Manufg Co.*, 42 Pac. Rep. 738 (1895) and *Penn. Fire Ins. Co. v. Faires*, 35 S. W. Rep. 55 (1896), as to condition requiring waiver by agent in writing being nugatory.—*Egan v. Westchester Fire Ins. Co.*, 42 Pac. Rep. (1895) 611, and *Oshkosh Matchworks v. Manchester Fire Ass. Co.*, 66 N. W. Rep. 525 (1896), when parol waiver by agent was held null.—*German-Amer. Ins. Co. of N. Y. v. Waters*, 30 S. W. Rep. (1896), 576, company not estopped by waiver of agent who had no authority to act after loss.—*Manchester Fire Ass. Co. v. Glenn et al.*, *North Brit. & Merc. Ins. Co. v. Glenn et al.*, 40 N. E. Rep. (1895), 926, for waiver by agent as to assignment of interest in policy.—*Jenkins v. German Ins. Co.*, 58 Mo. App. 210; *Dryer v. Security Fire Ins. Co.*, 62 N. W. Rep. 1050 (1895), and *Allen v. St. Lawrence Co. Farmer's Ins. Co.*, 34 N. Y. Suppl. 872 (1895), soliciting agent no power to waive.—*Sun Fire Office v. Wich.*, 39 Pac. Rep. (1895) 587, applicant must ascertain scope of soliciting agent's authority.—*Ruthven et al. v. Amer. Fire Ins. Co.*, 60 N. W. Rep. (1894), 663, clause in policy limiting agent's power valid when assented to by assured.—*Elsner, Admr. v. Prud. Ins. Co. of America*, 68 N. Y. State Rep. (1895), 124; 34 N. Y. Suppl. (1895), 246, statements by collecting agent.—*Milwaukee Mech. Ins. Co. v. Brown*, 44 Pac. Rep. 35 (1896); *Potter et al. v. Phoenix Ins. Co.*, 63 Fed. Rep. (1894), 382; *German*

There are many other recent American decisions regarding insurance contracts changed by parol statements of agents.¹

In a case where the Court of Appeals of Kentucky held, a forfeiture of the conditions as to other insurance had been waived by notice to the agent, it was insisted that the agent in this case

Fire Ins. Co. v. Columbia Encaustic Tile Co., 43 N. E. Rep. 41 (1896), for presumption as to powers of agent.—*Johnston v. Scottish Union & Nat. Ins. Co.*, 67 N. W. Rep. 416, (1896); *Com. Fire Ins. Co. v. Morris et al.*, 18 South Rep. 34 (1895); *Amer. Empl. Liability Ins. Co. v. Barr*, 68 Fed. Rep. (1895), 873, for effect of secret instructions to agents.—*Corrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418; *Southern Life Ins. Co. v. Booker*, 9 Heiskell 606; *Marcus v. St. Louis Mut. Ins. Co.*, 68 N. Y. 625; *Hartford Life & Ann. Ins. Co. v. Hayden's Admr.* (1890), 90 Ky. 39; *Lamberton v. Connecticut Fire Ins. Co.* (1888), 39 Minn. 129, as to restrictions in agent's power and their waiver by conduct of general agent.

See also: *Ruthven et al. v. American Fire Ins. Co.*, 60 N. W. Rep. (1894), 663, referred to *supra*, as to delegation of powers of adjuster.—*Stanhilber v. Mut. Mill Ins. Co.* (1890) 76 Wis. 285; *Messelback v. Norman as Treasurer etc.* (1890), 122 N. Y. 578; *Warren v. Phoenix Ins. Co.*, (1892), 19 N. Y. Suppl. 990; *Bromfield v. Union Ins. Co.* (1888), 87 Ky. 122; *Continental Life Ins. Co. v. Chamberlain* (1899), 132 U.S. 304, as to power of agent to waive.—*Queen Ins. Co. v. Kline et al.*, 32 S. W. Rep. 214, (1895), for waiver as to extension of time for completion of building.—*Roberts, Willis & Taylor Co. et al. v. Sun Mut. Ins. Co.*; *Same v. Lancashire Ins. Co.*, 35 S. W. Rep. 955 (1896); *N. W. Nat. Ins. Co. v. Mire*, 34 S. W. Rep. 670 (1896); *Parsons et al. v. Knoxville Fire Ins. Co.*, 34 S. W. Rep. 476 (1896), waiver of "iron-safe clause" etc.—*German Amer. Ins. Co. v. Humphrey*, 25 Ins. L.J. 658 (1896), waiver of condition as to encumbrances.—*Rediker v. Queen Ins. Co.*, 6 N. W. Rep. 105 (1895); *McGuire v. Hartford Fire Ins. Co.*, 40 N. Y. Suppl. 300 (1896), waiver of condition as to chattel mortgage.—*McLeary et al. v. Orient Ins. Co.*, 32 S. W. Rep. 583, (1895); *Rockford Ins. Co. v. Borrum* (1890), 40 Ill. App. 129, authority of local agent to consent to vacancy.—*Dwelling-House Ins. Co. v. Dowdell*, 55 Ill. App. 622; *Terry v. Provident Fund Soc. of New York*, 41 N. E. Rep. (1895), 18, cited above, company estopped by acts of agent.—*Croft v. Hanover Ins. Co. et al.*, 21 S. E. Rep. 854 (1895), cited *supra* and *infra*, power of agent representing several companies.—*Stewart v. "Helvetia" Swiss F. Ins. Co.*, 36 Pac. Rep. (1894), 410, local agent no power to renew a policy.—*Western Ass. Co. v. Williams*, 21 S. E. Rep. (1895), 370, when agent may consent to change of repository of goods.—*Laughlin et al. v. Fidelity Mut. Life Ass'n*, 28 S. W. Rep. (1894), 411, admissions by agent as to liability of company.—*Croft v. Hanover Ins. Co. et al.*, 21 S. E. Rep. (1895) 854, cited *supra*, on oral agreement with agent as to amount of indemnity.—*Tripp v. Northwestern Live Stock Ins. Co.*, 59 N. W. Rep. (1894), 1, consent of agents to killing of stock.

¹ *Ins. Co. v. McLanatham*, 11 Kan. 533, 549; *Ins. Co. v. Gray*, 43 Kan. 497, s. c. 23 Pac. Rep. 637; *Ins. Co. v. Earl*, 33 Mich. 143; *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Phoenix Ins. Co. of Brooklyn v. Munger*, (1892) 49 Kan. 78; *Lpl. & Ldn. & Globe Ins. Co. v. Sheffy*, 16 South Rep. 307 (1895); and *Lamberton v. Ins. Co.*, 39 Minn. 129, s. c. 39 N. W. Rep. 76, where it was said, that "a contracting party cannot so tie his own hands, so restrict his own legal capacity for future action, that he has not the power, even with the assent of the other party, to bind or obligate himself by his further action or agreement contrary to the terms of the written contract."

In *Ins. Co. v. Earl supra*, and *Seaman v. O'Hara*, 29 Mich. 66, the court said, that "any written contract, not within the statute of frauds, may be changed by parol," and in *Kennebec Co. v. Ins. Co.*, 6 Gray 204, 209, this rule has been applied to the enlargement and continuance of policies of insurance.

was not such an one, on account of restrictions in the policy, as that notice to him was notice to the company. To this contention the court said :—

“ The tendency of recent decisions, and, we think, properly, is to hold the insurer bound by the acts and conduct of the local agent, whenever it can be done consistently with the rules of law.¹ The maxim : ‘ *Qui facit per alium, facit per se* ’ should apply with peculiar force to the act of an insurance agent. He usually represents a company remotely located. Its patrons in his vicinity naturally look to him for direction generally as to the insurance obtained through him. He is generally regarded as having full power in reference to it.

Being usually the only man upon the ground having anything to do with it, the persons insured in his company, with few if any exceptions, would, in the absence of notice that his powers were limited, regard his statement as to any matter relative to such insurance as authoritative, and any notice to him as to it as sufficient. They rarely know anything of the company, or of its officers who issue the policies, and look to the agent, through whom they have obtained the insurance, as the complete representative of the company in everything connected with that insurance. If they did not consider that they were authorized to do so, it would undoubtedly create distrust and cripple the business. As to third parties, the agent should, in the absence of notice to the contrary, be regarded as possessing all the powers his occupation fairly imports to the public.

Under this rule, an agent who solicits the insurance, takes the application, receives the premium and delivers the policy, may, in our opinion, by his conduct or acts, bind the company by way of waiver of a forfeiture on account of additional insurance, in the absence of knowledge upon the part of the assured that his powers in this respect have been restricted. This being so, it follows that the knowledge of the agent under such circumstances is to be imputed to the company.”²

The question as to how far a company is bound by the fact of

¹ See *supra* § 322, *Hardwick v. State Ins. Co.* (1891), 20 Or. 547.

² *Phoenix Ins. Co. v. Spiers* (1888), 87 Ky. 285. See also *Arff v. Star Fire Ins. Co.* (1890), 125 N. Y. 57, and *Mellen v. Hamilton Ins. Co.* and *Devens v. Mech. etc. Ins. Co.*, cited there, as to notice to agent of other insurance and definition of “ broker.”—*Home Friendly Soc. v. Berry* (Ga. S. C.) 21 S. E. Rep. (1895), 583, for notice to agent as to false representations regarding non-membership.

its agents having been aware of circumstances not stated in the application and policy or contrary to the conditions set forth therein, has given rise to a large number of decisions in the United States. As a rule the courts have been of opinion, that the knowledge of an agent is knowledge of the company, and they have accordingly declared in favor of the assured.¹

¹ *Indiana Ins. Co. v. Hartwell*, (1880) 123 Ind. 171; *Hartford Fire Ins. Co. v. Moore*, 36 S. W. Rep. 146 (1896); *Dwelling House Ins. Co. v. Snyder*, 25 Ins. L. J. 715 (1896), as to description of risk.—*Richards v. Washington F. & M. Ins. Co.* (1896), 60 Mich. 420, for misdescription of situation.—*Bennett v. Agric. Ins. Co. of Watertown* (1884), 15 Abb. N.C. 234, 237, regarding vacancy.—*Arff v. Star F. Ins. Co.* (1890), 125 N. Y. 57, for additional insurance.—*Wood v. Amer. F. Ins. Co.*, 149 N. Y. 382 (1896), restriction of agent's power not applicable to breach of conditions avoiding contract in its inception.—*Dick et al. v. Equitable F. & M. Ins. Co.*, 65 N. W. Rep. 742 (1896), regarding knowledge of foreclosure proceedings, attempted restriction of agent's power ineffectual.—*Dupuy v. Delaware Ins. Co.*, 21 Ins. L. J. (1896) 161; *Westchester F. Ins. Co. v. Wagner & Chabot*, 24 Ins. L. J. (1895), 476; *Clark et al. v. Knoxville F. Ins. Co.*, 1 Miss. App. Rep. (1895), 338; *Trundle v. Providence-Washington Ins. Co.*, 54 Mo. App. 188; *West v. Norwich Union F. I. Soc.*, 37 Pac. Rep. (1894), 685; *German-Amer. Ins. Co. v. Hart*, 24 Ins. L. J. (1895), 273; *McGonigle v. Susquehanna Mut. F. Ins. Co.*, 31 Atl. Rep. (1895), 868; *Goss v. Agric. Ins. Co. of Watertown*, 65 N. W. Rep. 1036 (1896); *Rhode Island Underwriters Ass'n v. Monarch*, 25 Ins. L. J. 116 (1896); *Phoenix Ins. Co. v. Phillips*, 16 Ky. L. Rep. (1894), 122; *Hart et al. v. Niagara Ins. Co. et al.*, 24 Ins. L. J. (1895), 87; *Home Ins. Co. of N. Y. v. Gibson*, 24 Ins. L. J. (1895), 458, referring to waiver as to title in consequence of agent's knowledge.—*Carey v. Home Ins. Co. of N. Y.*, 66 N. W. Rep. 920 (1896), title in name of wife, policy payable to husband.—*Phoenix Ass. Co. of London v. Coffmann et al.*, 32 S. W. Rep. 810, (1895), rejection of previous application.—*N. W. Mut. Life Ins. Co. v. Amerman*, (1887), 119 Ill. 329, and *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, cited there, as to effect of receiving premiums after due, with knowledge of breach of conditions.—*Georgia Home Ins. Co. v. Stein et al.*, 18 Southern Rep. 414, (1895); *Phoenix Ass. Co. of London v. Coffman et al.*, 32 S. W. Rep. 810 (1895), cited above; *German Ins. Co. v. Everett*, 36 S. W. Rep. 125 (1896); *McDonald v. Fire Ass. Co. of Philadelphia*, 25 Ins. L. J. 708 (1896); *Robbins v. Springfield F. & M. Ins. Co.*, 25 Ins. L. J. (1896), 652, 149 N. Y., 477; *Coles v. Jefferson Ins. Co.*, 25 Ins. L. J. 247 (1896); *Perry v. Dwelling-House Ins. Co.*, 33 Atl. Rep. 731 (1896); *McGuire v. Hartford F. Ins. Co.*, 40 N. Y. Suppl. 300 (1896), knowledge of encumbrances.—*Liverpool & London & Globe Ins. Co. v. Farnsworth Lumber Co.*, 17 Southern Rep. (1895) 445, waiver of clear-space clause.—*German Ins. Co. v. Hart*, 16 Ky. L. Rep. (1894), 344, knowledge of intention to use a thresher near a barn.—*In re Pelican Ins. Co. of New Orleans*, 24 Ins. L. J. (1895), 535, agent's knowledge of firm being composed of one person only.—See also *Queen Ins. Co. v. May*, 35 S. W. Rep. 829 (1896), when knowledge of agent as to encumbrances did not estop company.—*Cook v. Standard Life & Acc. Ins. Co.* (1890), 84 Mich. 12, and *Beach*, 236, note 1, as to agent's knowledge of assured not being strictly temperate.—*Union National Bank of Oshkosh v. German Ins. Co. of Freeport*, 71 Fed. Rep. 473 (1896), knowledge of over-insurance, agent being attorney for insured.—*Kenyon v. Knights Templars Ass.*, 122 N. Y. 247 (1890), and see *Cook on Life Ins.*, § 20, where knowledge of agent and company of false statements does not prevent forfeiture.—*Ward v. Metrop. Life Ins. Co.*, 25 Ins. L. J. 325 (1896), as to knowledge of general superintendent.—*Westend Hotel & Land Co. v. American Fire Ins. Co.*, 25 Ins. L. J. 854, (1896), as to knowledge of local soliciting agent obtained after execution of policy; his mere silence does not operate as a waiver.—*Thacker Mining*

330b. Action for recovery of premiums on account of insolvency of company having been known to agents.—In an action for the recovery of premiums paid for a life insurance, on the ground that the company was insolvent at the time the policy was taken out, and that the agents were aware of this, but deceived the applicant by repeated fraudulent statements as to the company's standing, the court expressed the opinion, that the company was able to pay all losses up to the time of its dissolution and became insolvent through a certain transaction long after the policy in question was issued, and that therefore the policy holder was not entitled to recover premiums paid.¹

330c. Acts and knowledge, etc., of agents' clerks—Delegation of power.—It has been held, that an ordinary agent of an insurance company has the power to employ clerks to discharge the ordinary business of his agency, and that a waiver of a character which the agent himself could make, is to be attributed to him when made by his clerk.

In *Bodine v. Exchange Fire Ins. Co.*,² it was said by Earl, commissioner :—" We know according to the ordinary course of business, that insurance agents frequently have clerks to assist them and that they could not transact their business if obliged to attend to all the details in person, and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to collect premiums, and to take payments of premiums in cash or securities, and to give credit for premiums or to demand cash, and the act of the clerk in such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person."³

& Smelting Co. v. Amer. F. Ins. Co., 1 Miss. App. Rep. (1895) 535 ; *Westerman v. Home Mut. Ins. Co. of Calif.* (1893), 5 Wash. 524, as to waiver of conditions by knowledge of agent.

¹ *Life Ass'n of America v. Goode*, (1888) 71 Tex. 90.—See *Unsell v. Hartford Life & Ann'y Ins. Co.* (1887), 32 Fed. Rep. 443 as to waiver of forfeiture after receiving premiums overdue.—*Lantz v. Vermont Life Ins Co.* (1891), 139 Pa. St. 546 ; *Marvin v. Ins. Co.*, 85 N. Y. 278 ; *Dean v. Ins. Co.*, 62 N. Y. 642 ; *Homer v. Ins. Co.*, 67 N. Y. 478 ; *Tennant v. Ins. Co.*, 31 Fed. Rep. 322 ; *Jackson v. Royal Ben. Soc. (N. Y. C. C.)*, 37 N. Y. Suppl. (1896) 28, 72 N. Y. St. Rep. (1876) 179, 15 Misc. 481, as to effect of agent's promise to receive or having accepted over due premium.—*Equit. L. A. Soc. v. Cole et al.*, 35 S. W. Rep. 720 (1896), agent has no authority to accept property in lieu of cash.

² 51 N. Y. 117. ³ Story on Agency, 24 ; but see *supra* § 322.

In the case of *Clark v. Glens Falls Ins. Co.*,¹ the general term of the Supreme Court held, that the policy in that suit, countersigned by a clerk in the office of the authorized and commissioned agent of the defendant, was a proper and valid policy, where the clerk was authorized by the agent to contract new insurances and to give renewals, to make monthly and daily reports, and collect premiums on policies and renewals issued.

In *Chase v. Peoples Fire Ins. Co.*,² it was held, that the knowledge of a clerk of the agents of defendant company, that the house insured was vacant, was the knowledge of the company itself.

And in *Kuney v. Amazon Ins. Co.*,³ the Supreme Court held, that a general agent of a foreign insurance company had a right, by virtue of his authority, and for the purpose of discharging the duties appertaining to his office, to employ all necessary agents, clerks and surveyors to enable him to conduct the business with correctness, intelligence and promptness, and that, when he did in fact employ others, their acts and contracts would be binding upon the company the same as if made personally by the general agent. The court added :— “ Enough has been said to show that an agent of an insurance company has the right to, and indeed it is the expectation of the company that he will, employ such clerks and other assistants as may be necessary and proper in order that he may do the business for which he has been appointed agent. Soliciting insurance is part of the business of such agents, and it is not to be assumed that such solicitation can be made only by the agents personally, nor can it be held as a matter of law that, when it is made by some person employed exclusively by them, such solicitation, on the part of the person thus employed, makes him an insurance broker and takes away from him his character as clerk or employee of the agents. The fact that the solicitor was compensated for his services to these agents by a commission on the business which he brought, is not conclusive upon the question of the capacity in which he worked. Clerks or other employees are frequently compensated by a commission upon the amount of business brought to the employer by them. In order to constitute him such an employee as to subsequent insurance in a case like this, it is not necessary that he should have been engaged to perform only such duties as may be and are done in the office of his employer. The

¹ 21 N. Y. W. Dig. 197.

² 14 Hun. 456.

³ 36 Hun. 66, referred to *supra* § 322.

place of the performance of the duties is neither the sole nor always a necessary criterion by which to judge of the nature of such service. The employee of the agent in the case of *Bodine v. Exchange Fire Ins. Co.*¹ was not confined to the office in the performance of duties which he discharged for his employer."

In *Waldman v. North British & Merc. Ins. Co.*² the court ruled, that a local agent cannot delegate his power of waiving the forfeiture of a policy to a person in his office employed in the discharge of clerical duties, of whose appointment the company has no knowledge.

330d. False answers inserted, and fraudulent or erroneous statements made, by agent.—There are numerous cases in which the courts in the United States have been called upon to decide in how far false answers inserted in the application by the agent, or false representations and statements, either fraudulent or erroneous, on the part of the agent, affect a contract of insurance. The references will be sufficient to show the trend of judicial opinion on this subject in the United States.³

¹ 51 N. Y. 117.

² (1890) 91 Ala. 170. *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117, *supra*, distinguished.—For other cases of delegation of agent's authority, effect of acts done, information given and false answers inserted, by clerks of agents, etc., see *German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 43 N. E. Rep. 41 (1896); *Internat. Trust Co. v. Norwich Union F. Ins. Soc.*, 71 Fed. Rep. 81 (1896); *McClure v. Mississippi Valley Ins. Soc.*, 4 Mo. App. 148; *Home Fire Ins. Co. v. Garbæz*, 25 Ins. L. J. 782 (1896); *German-Amer. Ins. Co. v. Humphrey*, 25 Ins. L. J. 658 (1896); *Springfield F. & M. Ins. Co. v. De Jarnett*, 19 South. Rep. 905 (1896); *Syndicate Ins. Co. v. Catchings* (Ala. S. C.), 16 South Rep. (1894) 46; and *Henderson v. Travelers Ins. Co.* (U. S. C. C. Wyo.), 24 Ins. L. J. (1895), 351.

³ *Wilkins v. Mutual Reserve Fund Life Ass'n* (1889), 54 Hun. 294, *Sullivan v. Phoenix Ins. Co.* (1885) 34 Kan. 170; *Silenberger v. Prot. Mut. Fire Ins. Co.* (1879), 89 Pa. St. 464; *Continental Ins. Co. v. Pearce* (1888), 39 Kan. 396; *Bernard v. United Life Ins. Ass'n*, 39 N. Y. Suppl. (1896) 356, 17 Misc., 115; *Clubb v. American Acc. Co. of Louisville*, 25 Ins. L. J. (1896) 876; *Smith v. Peoples Mut. Live Stock Ins. Co. of Penn.*, 25 Ins. L. J. 444 (1896); *Robinson v. Metrop. Life Ins. Co.*, 37 N. Y. Suppl. 146 (1896); *Corbitt et al. v. Metrop. Life Ins. Co.*, 30 N. Y. Suppl. (1894) 1009, 63 N. Y. St. Rep. (1895) 309; *Bernard v. United Life Ins. Ass'n*, 33 (N. Y. Suppl. (1895), 22, 66 N. Y. St. Rep. (1895) 521; *Contin. Ins. Co. v. Chew*, 38 N. E. R. (1894) 417; *Home Fire Ins. Co. v. Fallon*, 24 Ins. L. J. (1895) 690; *Russell v. Detroit Mut. F. Ins. Co.* (1890), 80 Mich. 407; *Springfield F. & M. Ins. Co. v. Phillips*, 16 Ky. L. Rep. (1894) 352, & *ib.* (1895) 390; *German Ins. Co. of Freeport v. Hayden et al.*, 40 Pac. Rep. (1895) 453; *Schell v. German Ins. Co.*, 1 Miss. App. Rep. (1895) 213; *O'Brien v. New Zealand Ins. Co.*, 41 Pac. Rep. (1895) 298; *U. S. Mut. Acc. Ass'n v. Kittenring*, 44 Pac. Rep. (1896) 505; *Metrop. Life Ins. Co. v. Wood*, 33 Weekly Law Bull. (1895) 346; *State Ins. Co. of Des Moines v. Du Bois et al.*, 44 Pac. Rep. 756 (1896); *Dwelling-House Ins. Co. v. Dowdall* 55 Ill. App., 622; *German-Amer. Ins. Co. v. Hart*, 24 Ins. L. J. (1895) 273; *Duryee, Comm'r v. U. S. Credit System Co.*—*John B. Ellison & Sons*, petitioners, 19 N. J.

330e. Agent's power regarding proofs of loss, etc.—While the subject matter of the preceding paragraphs related for the most part to acts or statements, etc., of the agent while engaged in procuring business for the company employing him, no small amount of importance attaches to his doings at the final stage of the contract, when the company is called upon to fulfil its part of the agreement. Whether an agent has authority to receive or waive proofs of loss; whether he may grant a delay in their delivery, and whether his refusal to furnish blanks, usually supplied by the company, is equivalent to a waiver of proofs; all these and similar questions have frequently led to differences which, failing an amicable settlement, have been laid before the courts as a final resort. A brief reference to some American decisions will suffice to show how the matter has been regarded by the judicial authorities in the States.¹

331. Liability of agent's bondsmen.—This is another matter in which recourse has frequently been had to the courts.

In *Bransford et al. v. Norwich Union F. Ins. Soc.*,² which was

Law Journal (1896) 57; *Croft v. Hanover Ins. Co. et al.*, 21 S.E. Rep. (1895) 854; *Alabama Gold Life Ins. Co. v. Garner* (1884), 77 Ala. 210; *Keystone Mut. Benefit Ass. v. Jones* (1890), 72 Md. 363; *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 30 N.Y. Suppl. (1894) 215; 10 Delehanty, 405; *Whitney v. Nat. Mas. Acc. Ass'n*, 59 N.W. Rep. (1894) 943; *Travelers Ins. Co. of Hartford v. Henderson*, 69 Fed. Rep. (1895), 762, 16 C.C.A. 390; *Beckwith v. Ryan*, 34 Atl. Rep. 488 (1896); *Union Nat. Bank of Oshkosh v. German Ins. Co. of Freeport*, 71 Fed. Rep. 473 (1896).

¹ *Harnden v. Milwaukee Mech. Ins.*, 41 N.E. Rep. 658 (1895); *Ermantraut et al. v. Girard F. & M. Ins. Co., Phila.*, 25 Ins. L.J. 87, 30 Lawyers' Rep'ts Annotated, 346 (1896); *Syndicate Ins. Co. v. Catchings*, 16 South Rep. 46 (1894); *Fitzworth v. Amer. Central Ins. Co.*, 1 Miss. App. Rep. (1895) 519; *Rockford Ins. Co. v. Williams*, 56 Ill. App. 338; *Mix v. Royal Ins. Co. (Pa. S.C.)*, 32 Atl. Rep. (1895), 460; *Bolan et al. v. Fire Ass'n of Phila.*, 2 Miss. App. Rep. (1896) 1375, as to authority of agents to receive proofs of loss.—See Wood, 419, 447 & Bliss. 296 on same subject.—*Dwelling House Ins. Co. v. Snyder*, 25 Ins. L.J. 715, (1896), when agent had no power to waive proofs of loss. *Shapiro v. St. Paul F. & M. Ins. Co.*, 63 N.W. Rep. (1895), 614; *Burlington Ins. Co. v. Kennerly*, 31 S.E. Rep. 155, (1895), statement by agent, that it is unnecessary to furnish proofs of loss, not binding upon company.—*Dwelling-House Ins. Co. v. Dowdall*, 55 Ill. App. 622, cited *supra*; *Sharp v. Milwaukee Mech. Ins. Co.*, 40 N.Y. Suppl. (1896), 817, waiver by agent of delay in furnishing proofs of loss.—*Coldham v. American Casualty & Security Co.*, 32 Weekly Law Bull. (1894), 620, a mere refusal by agents to furnish blanks for proof of death not a waiver.—*Travelers Ins. Co. v. Harvey* (1885), 82 Va. 949, refusal by general agent to recognize a claim is a waiver as to notice and proofs of loss.—*Oshkosh Matchworks v. Manch. Fire Ass. Co.*, 66 N.W. Ry. 525 (1896), examination of assured as to loss not a waiver of breach of policy.—*Roberts Willis & Tailor Co. et al. v. Sun. Mut. Ins. Co.*—*Same v. Lane Ins. Co.*, 35 S.W. Rep. 955 (1896), limitation of power of agent not applicable to adjuster.—See also *infra* chap. XVII.

² 39 Pac. Rep. (1895) 419.

an action on the bond of an agent, the question was whether, in case of an agent assigning his insurance business to a company, the latter to sell to the best advantage and apply the proceeds to the agent's indebtedness, the company was bound to sell the agency for the highest price that could be realized, without reference to the character of the purchaser. The court expressed the opinion that, from the nature of the business and the terms of the agreement, the company had a right to take into consideration whether the purchaser was qualified by experience, ability, etc., to properly represent a company in the important business of taking risks for and on their behalf.¹

¹ See also *Union Central Life Ins. Co. v. Smith et al.*, 63 N. W. Rep. (1895) 438, where it was decided, that notice by a sub-agent and his bondsmen to a general agent of termination of contract is notice to the company.—*Royal Ins. Co. v. Clark*, 63 N. W. Rep. (1895) 1029, where the bondsmen were considered liable for a loss accruing to the company through the failure of the agent to cancel as instructed.—*Aetna Ins. Co. v. Fowler et al.*, 66 N. W. Rep. (1896) 470, where the court expressed the opinion, that a company must inform the sureties of facts within its knowledge which may affect their future liability.

CHAPTER XIV.

MUTUAL INSURANCE.

332. GENERAL REMARKS ON MUTUAL INSURANCE.

333. LEADING CANADIAN DECISIONS INTERPRETING THE STATUTE LAW — ONTARIO INS. ACT RETROSPECTIVE — FIRE INS. POL. ACT APPLICABLE TO ALL MUTUAL COMPANIES IN ONTARIO — APPLICABILITY OF UNIFORM CONDITIONS ACT — TIME ALLOWED COMPANY TO PAY LOSS, PREMATURE ACTION — FRATERNAL ACCIDENT INSURANCE SOCIETY WITHOUT LICENSE — DOMINION INS. ACT, 1877; ONTARIO COMPANY'S RIGHT TO DO BUSINESS IN QUEBEC — LIMITATION OF MEMBERS' LIABILITY — MUTUAL AID SOCIETIES GOVERNED BY SAME LAW AS ORDINARY INSURANCE COMPANIES; FALSE STATEMENTS REGARDING

HEALTH — HYPOTHECATION AND ADDITIONAL INSURANCE.

334. ASSESSMENTS, AND DECISIONS REGARDING THEM.

335. NOTES GIVEN IN SETTLEMENT OF LOSS.

336. WAIVER ON ACCOUNT OF DENIAL OF LIABILITY.

337. PAYMENT INTO COURT BY BENEVOLENT SOCIETY.

338. PHYSICIAN'S CERTIFICATE FINAL AS TO DAILY INDEMNITY IN CASE OF INJURIES.

339. DISTRIBUTION OF PROCEEDS OF MUTUAL BENEFIT CERTIFICATE — CHANGE OF BENEFICIARY.

340. RECENT AMERICAN DECISIONS.

332. General remarks on mutual insurance.—The formation of the different mutual insurance companies authorised by the legislative enactments of the provinces is treated of in chapter XXV.

We will consider here the decisions only, affecting such companies. These are numerous and important, and they well repay the labor of analysis. It may be said, however, in brief, that what gives the mutual characteristic to insurance, is the double quality of insurer and insured inherent in each member of the mutual company. From this results the variability of the assessment.¹ Mutual insurance is distinct from all idea of speculation or traffic. It covers only warranty and reparation for loss suffered by the members of the company.²

As we have seen, although the policies issued by a mutual company are not commercial contracts, such a company may make a commercial contract.³

¹ *Pandectes Françaises*, verbo *Ass. Mut.*

² *Bedarride, Jur.—Com.*, p. 259, par. 276.

³ *B. E. Mut. Life Ass. Co. and Bergevin*, 5 R. J. Q., Q. B. 55; *supra* § 23a, 251 *et seq.*

According to the Ontario Insurance Act, "mutual insurance" means, in the case of fire or live stock insurance, insurance given in consideration of a premium note or undertaking with or without an immediate cash payment thereon; and "mutual company" means a company empowered solely to transact such insurance.¹

Mutual insurance has also been explained as "an association of persons for insurance purposes, but without subscribed capital, who agree to pay by pro-rata assessments for each other's losses as they occur. A small cash payment is usually made, when the insurance is taken out, to cover expenses, and a premium note or bond for an agreed sum is given upon which assessments are to be made as needed. The insured thus becomes an insurer of others to get his own insurance, and pays pro-rata for the losses of others to get his own indemnity, of which, however, he pays his own share also. Should losses prove heavy and the company dissolve, each member, at the time of dissolution, becomes liable for his full quota of any remaining indebtedness, without regard to the payment of his premium note, which is only an estimated amount for the present purpose of assessments to meet current losses and expenses. There are several modifications of the mutual system; as, the purely mutual, where no cash is paid down; where a premium note and some cash are taken, and where a cash premium is taken sufficient to carry the risk to expiration, and no note is given, but all indebtedness is met by pro-rata assessment."²

Where a company was authorized by its charter to carry on both proprietary and mutual insurance business, but was debarred from taking extra-hazardous risks in the mutual branch, the question arose whether a policy, issued on property falling within the prohibited class and which was not on its face a mutual one, but an absolute undertaking to pay the loss, belonged to the mutual class, as, instead of a cash payment, a premium note had been

¹ 60 Vic. c. 36 (O), s. 2, ss. 42.

² Griswold, 326.

The peculiar character of mutual insurance has formed the subject of a very learned report by Prof. Dr. Ehrenberg of Göttingen, delivered at the 24th session of German Jurists, and reproduced in the supplement to the Munich Allg. Zeitung of 7th March, 1897. It was there pointed out, that the individual rights of a member in a mutual life assurance company must be treated differently from those in other kinds of insurance, as claims do not arise until after the assured has died or until he has ceased to be an active member, and because the assured cannot leave the society and join another, whenever he wishes, under equally favorable conditions.

given and several assessments paid thereon, the application also being headed "Premium Note System."

Reversing the judgment of the Court of Chancery,¹ the Ontario Court of Appeal was of opinion that, with the exception of the premium note, which was not conclusive proof, there was nothing to show that the insurance had been effected on the mutual plan, and that the property was of such a nature that it could not be taken in the mutual branch.²

It was also held (reversing the decision reported 9 P. R. 185, which followed *Lount v. The Canada Farmers' Ins. Co.*³), that R. S. C. (1877), c. 181, s. 61, providing as to mutual insurance companies, that no execution shall issue against such company upon any judgment until after the expiration of three months from the recovery thereof, does not apply where the judgment has been recovered on a policy issued by the company on the cash principle.⁴

In another case, the defendants, a mutual insurance company in existence at the time of the passing of the Mutual Companies' Act of 1873, 36 Vict., c. 44 (Ont.), had divided their business into several branches and had also raised a guarantee capital fund, out of which the losses in all the branches as they arose were paid. The by-law for raising the guarantee fund, passed on the 12th January, 1874, contained a provision that, from the surplus profits of the company from year to year and by assessment of premium notes, a reserve fund should be created for the purpose of paying off the guarantee capital.

In a suit by a creditor, to realize the assets of the company, it appeared that the amounts to be collected on the premium notes in two branches would not suffice to pay the losses in those branches, and that the amounts to be collected on such notes in the other two branches were sufficient for that purpose:—

It was held by Proudfoot, V. C., on appeal from the Master, that the policy holders in the solvent branches were liable to be assessed on their premium notes for the purpose of paying off the liability due to the guarantee stock holders, so far as might be necessary to discharge losses paid in those particular branches from the guarantee fund.

On appeal, it was decided that, whatever might be the power

¹ 28 Chy. 525.

² *Lowson v. Canada Farmers' Mut. F. Ins. Co.*, 6 A.R. 512.

³ 8 P.R. 433.

⁴ S.C. 8 A.R. 613.

of the directors, the Court of Chancery had no jurisdiction to make the assessment.¹

Burton, J. A., was doubtful as to the effect of section 75 of R. S. C. (1877) c. 161, and its inconsistency with the clauses of the Act relative to branches and the exemption of the members of one branch from liability for claims on another.²

It was further held, reversing the decision of Proudfoot, V.C.,³ Osler, J., dissenting, that under the Mutual Insurance Act, R.S.O. (1877) c. 191, the cost of a solicitor for services rendered to a mutual insurance company are chargeable not against the general assets of the company, but against the respective branches for which the services were in fact rendered, and in case of deficiency of assets of any of the branches the other branches are not liable for the claims thereon.

Per Osler, J.:—A creditor of the company, for a debt incurred as part of the necessary expenses of the company, though in relation to the business of some of its branches only, is entitled to be paid out of moneys derived from assessments for losses and expenses on policy holders in other branches.⁴

It has been said in Quebec, that the only loans a mutual insurance company, organised under chapter 63 R. S. L. C., is authorised to make, are those mentioned in section 21 of said statute, for the purpose of paying losses incurred and incidental expenses and in order to avoid more than one annual repartition.⁵

And it has also been held, that the directors of a mutual insurance company may, under R. S. O. (1877) c. 161, s. 29, borrow money on promissory notes or debentures without passing a by-law under seal.⁶

In another case, trustees were indebted to the plaintiffs and, holding stock in the defendants' company, assigned the stock to the latter in consideration of a sum expressed to be paid by them for the trustees to the plaintiffs. The sum was paid by the issue of the defendants' debentures to the plaintiffs:—

The court declared, that the transaction did not constitute a "loan of money" from the plaintiffs to the defendants within the

¹ Duff v. Canadian Mut. Ins. Co., 6 A.R. 238. ² Idem.

³ 9 P. R. 292, referred to *infra* p. 532. ⁴ S. C. 2 O. R. 560, referred to *infra* p. 532.

⁵ Molsons Bank & Mutual Ins. Co. of Joliette, 13 R. L. 392, S. C. 1883, referred to *infra* §§ 333 and 334.

⁶ Victoria Mut. Fire Ins. Co. v. Thomson, 32 C.P. 476.

meaning of 31 Vict. c. 52 s. 12 (Ont.), and that the issue of the debentures was therefore *ultra vires*.¹

Where the constitution of a benevolent society provides, that beneficiary certificates may be granted to persons who take a certain degree, all the steps laid down in the constitution in connection with the taking of that degree must be complied with, before any beneficiary certificates can be legally issued. Where, therefore, the holder of a certificate, though in all other respects duly qualified and accepted as a member of the degree in question, dies before actually going through the ceremony of initiation, the certificate is not enforceable.²

The expulsion of a member from a society was the cause of the following action : —

The plaintiff, as executor to his deceased son, sued the defendants, an incorporated benefit society, to recover the money benefit accruing upon the death of a member. Before the death, the defendants had passed a resolution removing the son from the list of members, on the ground that he had given untruthful answers to questions as to his state of health put to him upon his admission. The complaints against him had been referred to the committee of management, who had reported in his favor, but the society, at a meeting, refused to adopt the report and, in the absence of the deceased, without any notice to him or opportunity of appearing, accepted an *ex parte* statement, made by a member present at the meeting, which had not been before the committee, and acted upon it by forthwith passing the resolution referred to. By the rules of the society it was provided that, if it should be established that a new member had not answered truthfully, he should *ipso facto* be excluded from the society, and also that, if it was proved after his admission that he had not answered truthfully, he should by reason thereof be struck off from the list of members. The committee of management was the body, appointed under the rules, to take the evidence and find the facts, their report being subject to confirmation or rejection by the society.

The court was of opinion that, upon the principle governing such an enquiry, the person accused should not be condemned without a fair chance of hearing the evidence against him and of being heard in his defence ; that the action of the defendants was

¹ Bank of Toronto v. Beaver & Tor. Mut. Ins. Co., 28 Chy. 87.

² Devins v. Royal Templars of Temperance, 20 A. R. 250.

contrary to these principles and to their own rule ; and, therefore, the expulsion was not legally accomplished and the plaintiff was entitled to recover.¹

In another action it appeared, that there was a claim of B. & D. for costs after a retainer by a mutual fire insurance company, and B. assigned his interest in it to D. upon certain trusts in which, however, B. had no interest. The court held, that the assignment was absolute, and D. entitled to sue ; and that B. having been president of the company when the costs were incurred, was no objection.²

333. Leading Canadian decisions interpreting the statute law.—As said above,³ the legislation concerning mutual insurance has been embodied in another chapter.⁴ The following legal decisions interpret certain sections of the legislation.

It has been held, that 53 Vict. c. 44 s. 4 (Ont.), substituting a new section for R. S. O. (1887) c. 167, s. 132, is retrospective in its operation, and applies to premium notes given before its passing as well as to those given afterwards.⁵

And in view of the fact, that the 28th section of the Mutual Fire Insurance Companies Act, 1881, makes the Fire Insurance Policy Act applicable “except where the provisions of the Act respecting Mutual Fire Insurance Companies are expressly inconsistent with, or supplementary and in addition to, the provisions of the said Fire Insurance Policy Act,” it has been decided, that this includes all mutual insurance companies doing business in the province. In this action it was not alleged in the pleadings, that there was anything in the defendants’ act “expressly inconsistent with” the Fire Insurance Policy Act, but merely that the matters were variations of the statutory conditions. It was also held, that the questions, so far as raised, were not of a constitutional character, so as to require notice to the Attorney General of the province and the Minister of Justice of the Dominion.⁶

The question of the applicability of the Uniform Conditions Act has been discussed in an action, the facts being as follows :—

¹ Gravel v. L'Union St. Thomas, 24 O.R. 1.

² S. C. 9 P. R. 292, but see S. C. 2 O. R. 560 *supra* p. 530.

³ *Supra* § 332. ⁴ *Infra* chap. XXV.

⁵ Re Saugeen Mut. Fire Ins. Co.—Knechtel's case, 19 O.R. 417 ; see Anchor Marine Ins. Co. v. Corbett, 9 S. C. R. 73.

⁶ Goring v. London Mut. Fire Ins. Co., 11 O.R. 82. See Robins v. Victoria Mut. Fire Ins. Co., 31 C. P. 562, 6 A. R. 427. Ballagh v. Royal Mut. Ins. Co., 5 A. R. 87.

Appellants, a mutual insurance company, issued in favor of J. F. a policy of insurance, covering him against loss by fire on a general stock of goods in a country store, and, under the terms of the policy, the losses were only to be paid within three months after due notice given by the insured, according to the provisions of 36 V., c. 44, s. 52 (O), now R. S. O. c. 161, s. 56, which provides that in case of loss or damage the members shall give notice to the secretary forthwith, and the proofs, declarations, evidence and examinations called for by or under the policy, must be furnished to the company within thirty days after said loss, and upon receipt of notice and proof of claims as aforesaid, the Board of Directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after receipt by the company of such proofs. A fire occurred on the 21st May, 1877. On the next morning J. F. advised the insurance company by telegraph. On the 29th June, 1877, the secretary of the company wrote to J. F.'s attorney that, if he had any claim, he had better send in the papers, so that they might be submitted to the Board. On the 3rd July, 1877, J. F. furnished the company with the claim papers, or proofs of loss, and the 13th July he was advised that, after an examination of the papers at the Board meeting, it was resolved that the claim should not be paid. On the 23rd August, 1877, J. F. brought this action upon the policy. The appellants pleaded, *inter alia*, that the policy was made and issued subject to a condition, that the loss should not be payable until three months after the receipt by the defendants of the proofs of such loss, to be furnished by the plaintiff to the defendants, and averred delivery of the proofs on the 3rd July, 1877, and that less than three months elapsed before the commencement of this suit.

The court declared on appeal, 1st. that a policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R. S. O. c. 162; 2nd. that the appellant company under the policy were entitled to three months from the date of the furnishing of claim papers, before being subject to an action, and that, therefore, respondent's action had been prematurely brought.¹

The case of *Regina v. Stapleton*,² is of especial interest inasmuch

¹ *Mutual Fire Ins. Co. of Wellington v. Frey*, 5 S.C.R. 82. *Ballagh v. Royal Mut. Fire Ins. Co.*, 5 Ont. App. R. 87 approved. *Citizens Ins. Co. v. Boisvert*, 11 Q.L.R. 377, *contra*.

² 21 O.R. 679, referred to *supra* § 26.

as it led to the passing of sec. 36 of the Ontario Insurance Corporations Act, 1892.

The defendant, with the alleged object of starting a branch of a society, called the "International Fraternal Alliance," having its head office in the United States, while in the province of Ontario induced a number of persons to make application for membership therein, and to pay a joining fee of \$5 which, in addition to certain alleged social benefits, entitled a member on application therefor and on payment of certain fees, to pecuniary benefits, namely, a certificate entitling the member to a weekly payment in case of sickness or accident, and certain other sums in case of death or after a stated period. The defendant gave the applicants a receipt acknowledging the payment of the \$5 for, as stated, the purposes mentioned in an agreement written thereunder, namely to forward to the head office the application on signature thereof, and, if declined, to return amount paid. But, if accepted, the payer was constituted a member, etc., entitled to the full benefits of all social etc. advantages; and thereafter might secure all the pecuniary benefits on application therefor.

The court was of opinion, that the defendant was carrying on the business of accident insurance, without having obtained the necessary license therefor, contrary to section 49 of the Insurance Act, R. S. C. ch. 124; and that no protection was afforded by section 48, relating to fraternal, etc., societies, the scheme not being an insurance of the lives of the members exclusively; and the conviction of the defendant for carrying on such business was therefore affirmed.

Where an action was brought to recover the amount of assessment due upon a premium note, the defendants pleaded, that since the passing of the Dominion Insurance Act of 1877, mutual fire insurance companies having their head office in the province of Ontario had no right to do business in the province of Quebec. The court decided, that the company plaintiff, having their headquarters in the city of Hamilton, Ont., and doing business in the province of Quebec previous to 1877, had a right to do business in the province of Quebec since, and the action was therefore maintained.¹

And in another case it was also held, that the defendants, as a

¹ Victoria Mut. Fire Ins. Co. v. Mullin, 6 L. N. 390.

mutual insurance company, were capable of granting insurances in Quebec as well as in Ontario.¹

In *Molsons Bank v. Mutual Ins. Co. of Joliette*² it was laid down, that a mutual insurance company, formed under chapter 63 R. S. L. C., is not an ordinary society ; the obligation contracted by the members is determined and limited by the terms of section 12 of said statute, and the directors have no power to add to or extend their liability beyond that provided for in above statute.

The question, whether mutual aid societies are governed by the same law as ordinary insurance companies, seems to have been answered in the affirmative by the decision in a case resulting from concealment and false answers as to state of health. The evidence showed that, when applying for admission to a mutual aid society, respondent's husband declared, that he was not subject to spitting of blood, that he had no other constitutional or accidental illness, and had never consulted a doctor. A condition of membership was the written acknowledgment by the applicant of the receipt of a copy of the society's by-laws and of familiarity with their stipulations, among which was the forfeiture of all benefits, and liability of expulsion from the society, in the event of his having knowingly concealed the truth in his medical examination. Shortly after admission, the assured appears to have taken ill and he died of consumption within four months. Upon inquiry it was learned, that less than two years prior to his application he had had a severe attack of *la grippe*, lasting for about three weeks, during which he had been spitting blood and had been under the doctor's care, whereupon the society brought suit against his widow and tutrix to his minor child, to set aside the contract and to be relieved from the payment of any amount to his heir.

The court in maintaining the action decided, that the deceased, having concealed a material circumstance and having made a false answer to a special enquiry in connection with his medical examination, by that circumstance alone vitiated the contract which the plaintiffs made with him on the faith of these declarations.³

With regard to additional insurance by mortgagor, it has been decided in one case,⁴ that a policy of insurance, issued by a mutual

¹ *Duff v. Can. Mut. F. Ins. Co.*, 27 Chy. 391.

² 13 R. L. 392, S. C. 1883, referred to *supra* § 332 and *infra* § 334.

³ *La Société des Artisans Canadiens Français & Gauvin*, R. J. Q., 4 Q. B. 339.

⁴ *Mut. Fire Ins. Co. of Richmond etc. v. Fee*, 16 R. L. 461.

company under the provisions of the Statute of Quebec of 1882, 45 Vict., c. 51, will not be voided because of the fact that the insured has, after the contract, hypothecated the property on which the insured buildings are constructed, and because the hypothecary creditor has, with the consent of the owner of the buildings, insured the same buildings in another company, without giving notice to the mutual company, unless on an action to recover the amount of the insurance, the mutual company prove, that its regulations prohibit hypothecation and a second insurance without previous notice to them.

334. Assessments, and decisions regarding them.—The payment of assessments being the principal obligation of the assured in a mutual insurance contract, it is not surprising to find that it has proved a fruitful source of litigation. The courts have had the subject submitted to them in all its various phases, and from the decisions in the cases cited hereunder it will be seen how the matter has been regarded in Canada.¹

It has been stated in *Molson's Bank v. Mut. Ins. Co. of Joliette*,² that the members of a mutual insurance company are only responsible for such losses as occurred during the time their policy was in force, and the repartition must show that the losses have been incurred within the term of the policy.³

And, similarly, it has been laid down in another case,⁴ that an assessment for the purpose of paying promissory notes given by a mutual insurance company, must be confined to the premium notes or undertakings current at the time the loss occurred in respect of, or to meet which, the company's notes were given, and that, consequently, new members cannot be assessed to pay notes given previously to their joining the company.

But it has also been declared in *Giles v. Brock*,⁴ that it is not competent for a person insured in a mutual insurance company, when called upon to pay assessments on his premium note, to compel the company to enter into a detailed statement of the losses, in order to establish the correctness of the assessments made by the directors. The latter, in making the assessments, are the agents of the insured, who in the absence of fraud is, *quoad* such

¹ See also *infra* § 340 for American decisions concerning assessments.

² 13 R.L. 392, S.C. 1883, referred to *supra* §§ 332 and 333.

³ *Victoria Mut. Fire Ins. Co. of Canada v. Thomson*, 9 A.R. 620. See *infra*.

⁴ (1882), 5 L.N. 369.

assessments, bound by their acts and by the terms of the premium note.

It has been held, however, that in an action for assessments by a mutual fire insurance company, the amount of the losses should be alleged and proved, and the nature of the debts should be established, so as to enable it to be seen, whether or not they are such as insurers are responsible for.¹

Where an application was made to the court to add to the persons who had signed premium notes as parties in the Master's office, and to direct the Master to assess the amounts due upon the notes and to order payment of the same to the receiver from time to time, and where it was shown that the directors had not made any assessment upon the notes pursuant to R. S. O. (1877) c. 161, sec. 45 *et seq.*, it was decided that, as the liability attached only upon such assessment by the directors, the court could not add to, or alter the liability of the parties who had made the notes, by referring it to the Master or a receiver to do that which the directors only could do; clause 75 of 36 Vic. c. 44, which gave power to a receiver to do this, having been omitted from the statute on revision.²

As regards the legality of assessments, the court expressed an opinion in a case where the directors of the plaintiff company assessed the defendant, a policy holder, for several sums, one of which was illegal, and sent one notice to him, claiming the amount of all the assessments, including the illegal one, in one sum.

It was held, that the plaintiffs were not entitled to recover any of the assessments.³

Another action was based on the validity of assessments made after the policy had been cancelled. The defendants in this case, on the 5th December, 1878, obtained from the plaintiffs a policy of insurance for \$2000, on account of which they gave a deposit note for \$160, for the balance of which the action was brought, and they pleaded, that on the first of March, 1880, the policy which they had held was cancelled by the plaintiffs and notice thereof given to the defendants, and that on the said 1st March, 1880, defendants had paid all dividends and calls made on the said note and were entitled to have it cancelled and returned to them. On

¹ Mut. Fire Ins. Co. of Joliet v. Dupuis, 28 L. C. J. 179.

² Hill v. Merchants & Manufacturers Ins. Co., 28 Chy. 560.

³ Victoria Mut. Fire Ins. Co. of Canada v. Thomson, 9 A. R., 620. See *supra*.

the part of the plaintiff, it was contended, that the onus was upon the defendants to show that the assessment sued for was for losses subsequent to the cancellation of the policy.

The court declared that, as regards the defendants, the resolution making the call should have stated, that it was necessary for the payment of losses incurred before the first of March, and the burden of proof was on the plaintiffs to show that it was so.¹

Where a mutual insurance company have, without objection, received payment of assessments after the proper date for their payment, they are not thereby debarred from insisting, on a subsequent occasion, upon the strict observance of the conditions of the company as to payment, when they give notice that they intend so to insist and there is no conduct on their part tending to mislead the insured. The judgment of the Queen's Bench Division was reversed.²

It was questioned in another case, whether the note given for the premium was negotiable notwithstanding the special agreement in it, and as to the effect of the defendants being described therein as the "Watertown Insurance Company," while their real name was "The Agricultural Insurance Company of Watertown, N.Y."³

In *Hochelaga Mutual Fire Ins. Co. & Lefebvre*⁴ it was said, that members of a mutual insurance company, paying premiums under 40 Vict. c. 72, s. 35, are liable for assessments for losses, and arrears of directors' fees cannot be offered in compensation of an assessment to meet specific losses. But it was also held in the same case, (reforming in this respect the judgment of the Superior Court) that, although fees due applicant as director could not be set up in compensation against such extra assessments, yet, as the company and liquidators had agreed to allow such fees in reduction thereof, the appellant ought not to be condemned for more than respondents had agreed to accept.

Where a resolution for the voluntary liquidation of a mutual insurance company under the Ontario Winding-up Act was adopted at a general meeting, on a report of the directors which contained a recommendation that policies be sent in to the liquidator and that members seek insurance elsewhere, one of the policy holders

¹ *Hochelaga Mutual Ins. Co. & Girouard*, 7 Q. L. R. 348 S. C. R., 1881.

² *Redmond v. Can. Mut. Aid Ass.* 18 A. R. 335.

³ *Sears v. Agricultural Ins. Co.*, 32 C. P. 585. C. P. S.

⁴ 6 L. N. 236, S. C. 1883, and 7 L. N. 226, Q. B. 1885.

sent in his policy accordingly, but no notice of actual cancellation was given to him, nor was anything further done in reference to cancellation. Afterwards, an assessment was made upon the policy by the directors with the concurrence of the liquidator, and the validity of this assessment being disputed, the question was brought before the court, which decided that the policy had not been cancelled and the assessment was good.¹

The question of the correctness of an assessment was also raised in a case² where, under judgment against a fire insurance company, the plaintiff caused a seizure to be made in the hands of its members on moneys due by him to the company. The court held, that the certificate of the secretary of the company defendant, certifying that the *tiers saisie* was indebted to it in the sum mentioned therein, must be considered as legal and sufficient proof, inasmuch as it is in conformity with the dispositions of the Ontario Statute, 36 Vic., c. 44, s. 48, and that this certificate suffices to establish in a legal manner the repartition or assessment claimed by the plaintiff against the *tiers saisie*.

And in another case³ it was decided, that the liquidators of a mutual insurance company have not an action against one of its members for his assessment, unless they exactly justify by allegation and prove the losses, debts and expenses, which render their action necessary, and unless they establish that they have conformed to the statute as to notices, and particularly in having posted a circular letter to the address of the defendant.

As regards attachments of assessments, the court ruled in *Lavoie v. Mutual Fire Ins. Co. of Hochelaga*⁴ that, in the absence of fraud, negligence or maladministration, it is not competent to a judgment creditor of a mutual fire insurance company of the province of Quebec to attach moneys payable to the company by way of assessment under the provisions of the Liquidation Statute, 28 Vic., cap. 13.

In an action,⁵ where the company defendants claimed the right, under R. S. O. (1887), c. 167, s. 131, to retain the amount of the premium note given by the mortgagor, until the time had

¹ In re City Mut. Ins. Co. & Stiefelmeyers case, 24 O. R. 100.

² Cadieux & Can. Mut. Fire Ins. Co., 28 L.C.J. 190, S.C.R. 1879.

³ Mut. Fire Ins. Co. of Joliet v. Bourgojn, 10 Q.L.R. 110.

⁴ 26 L.C.J. 166, S.C. 1882.

⁵ Anderson v. Saugeen Mut. Fire Ins. Co. of Mt. Forest, 18 O.R. 355.

expired for which the insurance was made, to cover any assessments that might be made thereon, the court was of opinion that, as against the mortgagee, they were not entitled to retain the amount.

And it has also been decided,¹ that the alienation by the debtor of an immovable, affected by the (unregistered) hypothec of a mutual insurance company, does not purge such hypothec which attaches to the land until full payment of the premium notes, and that such hypothec includes the costs of a personal judgment obtained against the debtor for the amount of such premium notes.

In treating of the subject of assessments by mutual life insurance associations, it may not be out of place to refer to a publication recently issued by the Ontario Insurance Department, which declares the rates charged at present by many societies to be manifestly too low. It is there pointed out, that the effect of careful medical selection is to reduce the death rate and to keep the mortality extremely low during the first years, and that, therefore, an average taken over a large number of members during the early stage of the company's existence is misleading as a basis for the calculation of annual premiums. In practice, it is found that a considerable number of the most eligible lives discontinue their insurance, while less desirable ones remain, so that lapses, far from being beneficial, operate to deteriorate the general quality of the persisting lives, and thereby tend to raise the subsequent death rate. The results of the investigations of English and American actuaries show the variability of the death rate and find their latest confirmation in the published experience of a Canadian company, which has supplied the Department with the figures on which its arguments are based. Practical experience has provided a rule, that is almost as certain as the tides, by which the number who will die out of a thousand healthy men may be calculated, and any society that ignores this rule cannot succeed.

335. Notes given in settlement of loss.—Where the by-laws of a mutual insurance company gave the president the management of its concerns and funds, with power to act in his own discretion and judgment, in the absence of specific directions from the directors; and where it was also his duty to sign all notes authorized by the board or by virtue of the by-laws, the president

¹ *Charest v. Stanstead & Sherbrooke Mut. F. Ins. Co.*, 12 Q.L.R. 254, Q.B. 1885.

being both president and treasurer, and also acting as secretary, it was held, that the plaintiff, who was the transferee for value, given before maturity, of a note signed in behalf of the company by the president, as president and treasurer, and given to the payee in settlement of a valid claim against the company, was entitled to recover the amount of said note from the company.¹

336. Waiver on account of denial of liability.—An action against a mutual fire insurance company can be brought to recover the insurance without previous recourse to the arbitration indicated by sections 51 to 57 of 45 Vict., c. 51 (Q), 1882, when the company plead that the policy is null on account of non-fulfillment of conditions by insured.²

337. Payment into court by benevolent society.—On an application by a benevolent society for leave to pay insurance money into court, claimed by different parties, the court declared, that sub-section 5 of section 53 of the Judicature Act extends the benefit of the Act for the relief of trustees to such cases, and that the society was entitled to pay the money in.³

338. Physician's certificate final as to daily indemnity in case of injuries.—It has been held, that the physician of a mutual aid society has absolute discretion as to the injuries giving a right to the daily indemnity. His certificate is final and his decisions are without appeal, except in case of fraud or collusion with the society or apparent bad faith.⁴

339. Distribution of proceeds of mutual benefit certificate—Change of beneficiary.—In the very recent case of *Johnston v. Catholic Mutual Benefit Association*,⁵ the court (MacLennan, J. A., dissenting) found, that the insurance moneys payable by the defendants under their beneficiary certificate, issued to Patrick O'Dea, and made payable to his executors, should be paid to his next of kin, and not to his creditors, as part of his estate. It was held, that the deceased had no power to make a valid appointment of the proceeds by his will, or by endorsement upon the certificate, but that the proceeds must be distributed amongst his

¹ *Jones v. E. T. Mutual Fire Ins. Co.*, in Review, M.L.R. 3 S.C. 413, 1887.

² *Montmagny Mut. Ins. Co. & Carbonneau*, 16 R.L. 275, and see *infra* chap. XIX.

³ *Re Bajus*, 24 O. R. 397.

⁴ *Dallaire v. Société Bienveillante de St. Roch*, 8 R. J. Q., S. C., 509.

⁵ Ontario Court of Appeal, 13th Jan., 1897, not yet reported.

next of kin, according to the rules of the society. The contention of the plaintiff, a creditor of deceased, that the case was not governed by sec. 11 of the Ontario Benevolent Societies' Act, but by the Dominion Act under which the society had subsequently incorporated, was overruled.

And in another very recent case¹ it appeared, that the *Commercial Travellers' Mutual Benefit Society of Western Ontario*, by its certificate of membership, dated 19th May, 1888, promised "to pay as many dollars, at the end of 60 days' notice to the society of the death of James Thorburn Fisher, as there are members in good standing in the society, to Mrs. Agnes E. E. Fisher, his wife, or such other beneficiary or beneficiaries as said J. T. Fisher may in his lifetime have designated in writing endorsed on this certificate, and in default of any such designation, to his legal representatives."

Before his death, the insured made the following endorsement on the certificate: "Toronto, Ont., April 12, 1892 -I hereby assign and transfer all my right, title, interest and claim in the within policy to my brother Robert Grant Fisher, to whom I direct payment of the same upon my death." The society paid the money to the brother, and the present action was brought by the widow against the brother. The widow claimed the money upon the proper legal construction of the certificate, and made a motion before the Master in Chambers, who referred it to a judge, for an order directing a trial of the legal question of the construction of the certificate before the trial of the action, in which the defendant set up a counter claim. The motion was refused.

340. Recent American decisions.—The system of mutual association for insurance purposes has, of course, received full consideration in the United States,² and, consequently, the amount of litigation has assumed very considerable proportions.

The cases quoted hereunder will serve to show to some extent how the American courts have viewed the questions submitted to their judgment.

It is a well established rule, that members of a mutual insur-

¹ Fisher v. Fisher, Toronto, 12th Jan., 1897, not yet reported.

² Under the heading of "Liability of Members of Mutual Fire Ins. Cos.," an exhaustive note is appended in 32 Lawyers' Reports, Annotated, (1896) 481, to the case of *Ionia, Eaton, and Barry Farmers' Mut. F. Ins. Co. v. Ionia Circuit Judge*, 100 Mich. 606, in which the subject is thoroughly dealt with in all its bearings.

ance company are presumed to know the by-laws of the company when they become members; they are bound by them and cannot question their validity, but the by-laws may be waived.¹ And fraud of the officers in leading a member to suppose that a certain condition did not exist, will not avail the assured in an action on the policy.²

It has been quite common for mutual life insurance companies to issue policies which were upon their face declared to be non-forfeitable and good for certain proportions of the amount insured, based upon full settlement of premiums for fixed periods, if premiums for these periods have been paid. In connection with many of these contracts it has been agreed, that the premiums shall be partly in cash and partly in premium notes, with other covenants as to payment of interest on these notes, and the application of dividends to which insured is to be entitled by the company in the reduction of premiums and payment of these premium notes.

There have been many adjudications by the courts as to the rights of policy-holders in these dividends and the duty of the companies in relation thereto. In a number of these cases, on account of a non-payment of interest on these premium notes or the principal, the companies have sought to have declared a forfeiture of the contracts. This has been frequently when the company has had in its hands dividends which, by the contracts, have been applicable to these notes.

In one of the latest cases in which the complete payment of the cash premium for any year or years, and the payment of the notes given for such years, was held to secure a non-forfeitable endowment of the corresponding number of "tenths" of the policy, the court decided that, a dividend being applicable towards the payment of a note at the same time that the interest on the note fell due, the default of the assured to pay the interest did not discharge the company from the duty to apply the dividend, if such application would pay off the note, and so prevent a forfeiture of the policy.³

In a Pennsylvania case it was said, that the mutual insurance

¹ Beach, 109 *et seq.*

² *Miller v. Hillsborough Mut. Fire Ass'ce Ass'n* (1887), 7 Atl. Rep. 895.—See also 10 Atl. Rep. 106 & 14 Atl. Rep. 278.

³ *Van Norman v. North Western Mut. Life Ins. Co.*, (1892), 51 Minn., 57; and see Beach 117.

company, having in its hands dividends sufficient to pay the premium note, cannot insist upon a forfeiture, and if it had such right, equity would compel such application to prevent forfeiture.¹

¹ *Girard Life Ins. Co. v. Mut. Life Ins. Co.*, (1881) 97 Pa. St. 15.

For other American cases of mutual insurance companies refer to :

Lagrone v. Timmerman et al., 24 S. E. Rep. 290 (1896), when the Act of Incorporation does not empower a mutual company to organize subordinate or branch organizations.

Easley v. Valley Mut. Life Ass'n, 24 Ins. L. J. (1895) 453, previous acceptance of premiums after default is not such a precedent as to constitute waiver of forfeiture.

Curtin v. Grand Lodge of Missouri, A.O.U.W., 2 Miss. App. Rep. (1896) 1206, by-laws as to non-suspension of sick members for assessments overdue do not apply to non-payment of assessments on the benefit certificate.

Burkheiser v. Mutual Acc't Ass'n of the Northwest, 61 Fed. Rep. (1894) 816 ; 26 *Lawyers' Rep., Annotated*, (1895) 112, the fact of an assured ceasing to be a member after an accident, because of default in paying an assessment, does not relieve the association from liability, if death occurs within the time stipulated.

Dettra, receiver, v. Lock, and idem v. Murray, 53 *Legal Intelligencer* (1896) 150 ; 5 Pa. Dist. R., 200, 201, where a member was liable for unpaid assessments, and the contract, although otherwise vitiated by fraudulent misrepresentations of officers of a mutual company, was sustained for the protection of innocent third parties, and where further the right to forfeit the contract for non-payment of assessments was declared to be optional with the company.—In *Susquehanna Mut. Fire Ins. Co. v. Leary* (1890), 136 Pa. St. 499, it was also held, that the invalidity of a policy cannot be set up as a defence in an action for assessments.

In *Carlton v. Southern Mut. Ins. Co.* (1884), 72 Ga. 371, 395 *seq.*, where the court was asked for instructions as to the distribution of the accumulations of a mutual company, it was said, that the general law of partnership as to profit and loss governs a mutual insurance company, but when a charter is granted, it stands in the place of the articles of partnership, it modifies the general law and becomes the governor wherever the two authorities collide. It was also there said, that a mutual incorporated society, unlike a mere partnership, must be born of the State and live so long as the State permits by the charter.

CHAPTER XV.

REINSURANCE.

341. GENERAL REMARKS.
342. LEGISLATIVE ENACTMENTS—
STATUTORY CONDITIONS NOT APPLIC-

ABLE — ASSENT TO REASONABLE
WAIVER OF CONDITIONS.
343. RECENT AMERICAN DECISIONS.

341. General Remarks.—Reinsurance is, of course, of much later origin than insurance proper, being of comparatively recent date. It owes its existence for the most part to a higher degree of prudence, resulting from a more intimate knowledge, on the part of the insurance companies, of the hazards against which they undertake to guard. It is merely insurance applied in a special way and to cover in whole or in part a risk already assumed.¹

Another and equally important factor that did not long escape the notice of insurers, and which has greatly contributed to the development of reinsurance, is the facility it offers the direct insurer in allowing him to underwrite sums far in excess of what he could safely carry on his own account. This affords him an opportunity of transacting business on a much larger scale, whenever he wishes to avail himself of it. The extent of this branch of insurance, especially in Europe, may be judged from the fact that there are many companies which confine themselves entirely to reinsurance, chiefly fire and marine, dealing not only with the ordinary insurance companies of their own country, but also with those of other countries. Such reinsurance transactions are effected in many instances on the basis of regular treaties, setting forth in exact terms all the details of the understanding; these treaties are either "facultative," *id est*, the first insurer may offer the reinsurer any risk he wishes him to share in, and the latter is at liberty to accept or decline; or they are "obligatory," and then the share of the business, which the one must give and the other must accept, and other particulars, are provided for in the treaty, and both parties are bound

¹ Canada Mut. F. Ins. Co. v. Northern Ass. Co., 2 A. R. 373.

by these mutual obligations. Such reinsurance arrangements tend largely to equalise the effect of any extraordinary disaster and thereby assist in eliminating the disastrous character from the insurance business.¹

When companies, making a special business of reinsurance, are involved in a risk for an amount in excess of the limit they have fixed for carrying on their own account, they have to resort to reinsurance themselves, which is then called "retrocession."

The reinsurer undertakes with reference to the first insurer, what the first insurer undertakes with reference to the insured, and subject to like rights, duties and obligations.²

As a rule, therefore, the first company pays its reinsurers their proportionate share of the premium received from the insured.

However, in the case of the *Canada Ins. Co. v. Northern Ass. Co.*,³ the court declared that, when a company effects a reinsurance and the second company charges the same premium as the first company states it is receiving from the person insured, when the reinsurance premium is in fact less than the original premium, this is not a misrepresentation which will avoid the reinsurance.

342. Legislative enactments — Statutory conditions not applicable.—Reinsurance was formerly prohibited in England,⁴ unless the reinsured was insolvent, bankrupt or dead, because it had been abused and perverted into a pretext for wager policies, but it is now a perfectly legitimate business by the law and practice of every country.⁵ In Quebec, the Civil Code⁶ expressly provides, that the insurer may effect a reinsurance, and the insured may insure the solvency of the first insurer.

As regards Ontario, the Insurance Act⁷ also gives special permission to the same effect, by providing that the board may make arrangements with any other company, registered to transact business in the province, for the reinsurance of risks, on such conditions with respect to the payment of premiums thereon as may be agreed between them.

And the same Act makes reinsurance compulsory⁸ in certain cases, the Act providing that, where a company has ceased to transact business in Ontario and has given written notice to that effect

¹ See *supra* § 19. ² *Canada Mutual Fire Ins. Co. v. Schaefer*, 4 Otto (U.S.) 457.

³ 2 A. R. 373. ⁴ 19 Geo. II. c. 371. ⁵ Phillips c. 3, § 13; May, 10.

⁶ C. C. L. C. 2477. See also R. S. C. 124, s. 7, (1886).

⁷ 60 Vic., c. 36 (O.), s. 102. ⁸ 60 Vic., c. 36 (O.), s. 51.

to the Minister and to the Insurance Registrar, it shall reinsure all such outstanding contracts as are within the intent of section 48 in some company or companies registered to do business in Ontario, or obtain a discharge of such contracts, and its securities shall not be delivered to the company until such reinsurance is effected to the satisfaction of the Minister.

A further reference to this subject is to be found in the Ontario Insurance Act,¹ where all the objects which may be covered by insurance are also allowed to be made the subject matter of reinsurance.

It has been said, however, that the object of the Act is to protect the original insured from the companies and not to protect the latter in a contract they may enter into for the sake of reducing their own liability. Statutory conditions cannot, therefore, be invoked in a case of reinsurance. This has been decided in *Fire Ins. Ass'n v. Canada F. & M. Ins. Co.*,² an action based upon the following facts :—

The Dominion Ins. Co. insured one H. against loss by fire to the amount of \$5,000, and under a contract of reinsurance, made between the defendants and the Dominion Company, the latter company reinsured \$2,500 with the defendants. Subsequently, the Dominion Company entered into an agreement with the Fire Ins. Association, whereby, after reciting that the Dominion Company desired to be relieved from and guaranteed against loss on existing risks, and that the Fire Ins. Association had agreed to do so and to reinsure said risks, the company transferred all their business and the goodwill thereof to the Association, who thereby reinsured all the existing risks, subject to the terms of the policies, etc., the Association to take and accept all reinsurances made with other companies, with power to use the company's name. A loss occurred on H.'s policy, which was adjusted and paid by the Association.

In an action against the defendants to recover the amount of the reinsurance, it was held, that the defendants could not escape liability, for either one or the other of the plaintiffs was entitled to recover, and that there was nothing in an objection raised as to double indemnity.

The court also decided, as said above, that the statutory con-

¹ 60 Vic., c. 36, s. 166. ² 2 O. R. 481, Q.B.D.

ditions could not be imported into and read with either the agreement between the plaintiffs or that between the Dominion Company and the defendants,¹ and that the defendants' contract of reinsurance did not prevent the plaintiffs from assenting to any reasonable and proper waiver or conditions made in good faith, and not shown to influence the loss or increase the burden of the reinsurers; an assent, therefore, given by the Dominion Company to a chattel mortgage on some of the insured goods, without the defendants' knowledge and assent, did not release the defendants.

Under a state of facts similar to those stated in the preceding case, except that the insurance was of one C.'s property, it was held,¹ that the plaintiffs were entitled to recover for treating the agreement between the plaintiffs as a reinsurance, (though more properly a transfer of business with its liabilities and collateral securities), if it was of the whole amount of the Dominion Company's liability; the Association having paid the whole loss to the company, or which was the same thing, to C., were entitled, irrespective of any assignment, to contribution from defendants; if however, it was only of the residue of C.'s risk, the defendants were still liable to the company on their policy, and by the very terms of the agreement it was effectually assigned to the Association, who acquired all their co-plaintiff's rights and interest in it. It was also held, that the statutory conditions were not applicable to such a contract of insurance as in this case.

All companies licensed under the Insurance Act of Canada, with the exception of assessment life insurance companies, and all companies licensed under the Ontario Insurance Act, except mutual fire insurance companies licensed only for the insurance of farm buildings and of isolated risks (such risks being other than mercantile and manufacturing risks), are required to maintain a reserve sufficient to balance their actuarial liabilities.² The rule for calculating this contingent liability of any company in respect of its insurance contracts varies according to the kind of business undertaken. In fire and inland marine insurance, it is the reinsurance value of all risks outstanding in Canada,³ or the reinsurance value of all risks outstanding in Ontario,⁴ as the case may be.

¹ S. C. 2 O. R. 495, and see *Clarke v. Union Fire Ins. Co.* Claim of the Agricultural Fire Ins. Co. of Watertown, 6 O. R. 640. S. C. McPhee's claim, ib. 635.

² R. S. C. 124, s. 9, 10; 60 Vic., c. 36 (O.) s. 45.

³ R. S. C. 124, s. 9, 10. ⁴ 60 Vic., c. 36 (O.) s. 45.

The usual reinsurance valuation by insurance departments is as follows: In fire insurance, the reinsurance value is taken at 50 per cent. of the gross premiums received and receivable; in ocean marine insurance, the reinsurance liability is 100 per cent. of premiums received on risks in force; in casualty insurance, it is 50 per cent. on yearly risks and part of the premiums proportionate to the unexpired time on risks written for a longer term; in fidelity and guarantee insurance, it is 80 per cent. of the yearly premiums on risks outstanding, or 80 per cent. of the yearly premiums on court bonds and 50 per cent. of the yearly premiums on the ordinary fidelity business. In life insurance, the reinsurance reserve of companies licensed by the Dominion or by Ontario is based upon a valuation of the policies according to the mortality table of the Institute of Actuaries of Great Britain, interest being taken at $4\frac{1}{2}$ per cent. per annum and the pure premiums only being taken.¹

343. Recent American decisions.—The amount of the reinsurer's liability to the reassured is the sum which the latter is legally liable to pay the original insured, and it is not subject to be reduced by the insolvency of the reassured and his consequent inability to pay to the original insured the full amount for which he is liable.²

In *Faneuil Hall Ins. Co. v. Liverpool & London & Globe Ins. Co.*,³ it was said, that there is nothing in the nature of the contract of reinsurance or of indemnity inconsistent with the power of the original insurer or its agent to assent to the assignment of the policy.

¹ R. S. C. 124, s. 25, ss. 10, s. 33, ss. 7, and see Hunter's Ont. Ins. Corp'n's Act, 1892, p. 65.

² 1 Marshall on Ins. 143; *Hone v. Mut. Safety Ins. Co.*, 1 Sanford Rep. Sup. Ct. of City of N. Y. 187; *Herckenrath v. Am. Mut. Ins. Co.*, 3 Barbour's Chan. R. (N.Y.) 63; *Cashau v. North Western Nat. Ins. Co.*, 5 Bliss. 476, 479.

³ (1891) 153 Mass. 63 s. c. 26 N. E. Rep. 244.—*Vide supra* § 342, and see also *Imp. F. Ins. Co. of London v. Home Ins. Co. of New Orleans*; *Royal Ins. Co. of Liverpool v. do.*, 68 Fed. Rep. (1895) 696, as regards application of co-insurance clause.—*Union Ins. Co. of San Francisco v. American F. Ins. Co. of N. Y.*, 40 Pac. Rep. (1895) 431, as to commencement of reinsurer's liability.—*German-American Ins. Co. v. Com. F. Ins. Co. (Ala. 1892)* 11 So. Rep. 117, on effect of "usage" in interpreting contracts.

CHAPTER XVI.

LIABILITY FOR LOSSES, WAIVER OF CONDITIONS, SUBROGATION, ARSON, ETC.

344. GENERAL REMARKS.

345. LIABILITY IN FIRE INSURANCE — CONSEQUENTIAL DAMAGE — NEGLIGENCE — EXTENT OF LIABILITY AND MEASURE OF DAMAGES — AMBIGUOUS AND CONTRADICTORY PROVISIONS — CHANGE AND INCREASE OF RISK.

346. LOSS BY REMOVAL AND THEFT AT A FIRE.

347. DAMAGE BY EXPLOSION—DEFINITION OF "GAS."

348. CLAUSE AS TO FOREST FIRES.

349. IDENTITY OF PROPERTY—BENEFICIARIES OF FIRE INSURANCE CONTRACT.

350. WAIVER OF CONDITIONS.

351. LOSS OCCURRING WITHIN DELAY GIVEN FOR PAYMENT OF RENEWAL PREMIUM — PAYMENT OF PREMIUM AFTER LOSS.

352. REFORMATION OF CONTRACT — MISTAKE IN AMOUNT OF POLICY—DURATION OF CONTRACT — COMPANY'S KNOWLEDGE OF INSURED'S INTENTION TO RENEW.

353. SUBROGATION — LOSS OF LIFE THROUGH NEGLIGENCE OF RAILROAD COMPANY—MARGUILLIER EN CHARGE—LANDLORD AND TENANT—NEGLECT OF MUNICIPAL SERVANTS — WHAEFINGERS' POLICIES—VENDOR AND PURCHASER.

354. SLIP OF POLICY, EFFECT OF.

355. INSURANCE AGAINST FIRE OF A STEAMSHIP IN DOCK DOES NOT COVER IT WHILE MOORED IN THE RIVER.

356. PLACE OF PAYMENT—LEX LOCI CONTRACTUS—PAYMENT INTO COURT.

357. DIVISIBLE SURPLUS—DISCRETION OF ACTUARY AND DIRECTORS.

358. TITLE TO LIFE INSURANCE POLICY —DEBTOR AND CREDITOR—SALE AND REDEMPTION OF ANNUITY—INSURANCE EFFECTED BY A FATHER ON HIS SON'S LIFE—LIFE ASSURANCE AS SECURITY FOR MONEY ADVANCED BY TRUSTEES OF WILL—APPLICATION FOR LIFE ASSURANCE ACCEPTED BY COMPANY, AND MATERIAL ALTERATION OF RISK BEFORE TENDER OF PREMIUM — POLICY LOST, DECREE OF COURT—SURRENDER VALUE NOT CHANGEABLE—FORFEITURE OF POLICY—PRESUMPTION OF DEATH FROM ABSENCE FOR SEVEN YEARS.

359. DE FACTO DIRECTORS—PERSONS FALSELY ASSUMING TO CARRY ON COMPANY.

360. REMITTANCE BY AGENTS IN EXCESS OF BALANCE DUE—RENEWAL OF LAPSED POLICIES, ALTHOUGH THERE WAS NO SPECIFIC APPROPRIATION.

361. PAYMENT EX GRATIA OF LOSS BY EXPLOSION—LIABILITY OF DIRECTORS.

362. EFFECT OF WAR.

363. ARSON—FELONIOUS ACT OF WIFE OF ASSURED—FORFEITURE OF INSURANCE FOR BUILDING AND CONTENTS—EVIDENCE OF ARSON — ARSON COMMITTED BY AGENT OF ASSURED—PAST ATTEMPT OF ARSON NO INCREASE OF HAZARD—THE FACT OF MANY PREVIOUS FIRES NOT ADMISSIBLE IN SUPPORT OF ARSON.

364. PLATE GLASS INSURANCE—PROXIMATE CAUSE OF DAMAGE—NOTICE OF LOSS TO AGENT.

365. LIABILITY IN ACCIDENT INSURANCE—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER—CAUSE OF DEATH

— EXTERNAL, VIOLENT, ACCIDENTAL AND VISIBLE MEANS—SUPERVENTION OF DISEASE—LEGAL PRESUMPTION IN CASES OF INJURIES—ACCIDENT OR SUICIDE—TOTAL DISABILITY FROM OLD AGE—EMPLOYER'S LIABILITY, AN INFANT AS MEMBER OF AN INSURANCE SOCIETY—CONSTRUCTION OF THE TERMS "ANY ONE ACCIDENT" AND "FROM (SUCH A DATE)"—ACCIDENT INSURANCE BY NEWSPAPERS.

366. LIABILITY IN GUARANTEE INSURANCE—BANK MANAGER ALLOWING OVERDRAFTS — GROSS NEGLIGENCE —

SUPERVISION OVER BOOKS—NOTICE TO COMPANY—DURATION OF COMPANY'S LIABILITY—FRAUD AND DISHONESTY AMOUNTING TO EMBEZZLEMENT—RECOVERY OF PART OF THE MONEY—CLAIM NOT AFFECTED BY BANK COMMUNICATING WITH ABSCONDER—EVIDENCE OF PREVIOUS FRAUDULENT ACTS ADMISSIBLE—PROSECUTION OF DISHONEST EMPLOYEE AS A CONDITION PRECEDENT—GUARANTEE INSURANCE AS APPLIED TO DEBENTURE-HOLDERS AND TO BANK DEPOSITS.

344. General remarks.—The foundation of the entire business of insurance in all the various branches of contingencies to which commercial enterprise or the idea of mutual assistance is applying it, is liability, or rather the transfer of liability from the individual to a corporation created for that purpose. While, therefore, all the manifold questions treated of in the preceding chapters of this work are really nothing more or less than questions of liability, though grouped under different headings, it has been found convenient to bring together those points which have not yet been discussed, or which may be looked at from a different aspect, under the general title of "liability."

345. Liability in fire insurance.—To make the underwriter liable under a fire policy, the loss or damage must be caused by fire; either by actual ignition of the property itself, or of some substance near by, causing the damage. Fire by actual ignition must be the proximate or efficient cause of the loss and not merely incidental to it. No liability attaches for damage by heat or smoke occasioned by the misapplication of fire-heat during the process of any manufacturing. Heat is not fire under the insurance policy; if there be no ignition there is no fire.¹

A fire insurance company is also liable for consequential damage, that is loss or damage, although not a necessary, nevertheless a natural or usual consequence of a fire, as from water used to extinguish the flames, the falling of floors, walls, etc.²

The Civil Code of Quebec provides, that in fire insurance the insurer is liable for losses caused by the insured otherwise than by fraud or gross negligence.³

¹ Griswold, 239. ² Griswold, 149.

³ C. C. L. C. 2578; Angell 122 & seq.; Alauzet 431; 3 Kent 374; and see Johnston v. Dominion Ins. Co., 23 A. R. 729, *infra*.

He is also liable for losses caused by the fault of servants of the insured, committed without the insured's knowledge or consent.¹

And for losses which are the immediate consequence of fire or burning, from whatever cause it may arise, including damage to the things insured suffered in their removal or by the means used for extinguishing the fire; subject, of course, to the special exceptions contained in the policy.² But he is not liable for losses caused merely by excessive heat in a furnace, stove, or other usual means of communicating warmth, when there is no actual burning or ignition of the thing insured.³

In the absence of any express condition, negligence is one of the risks ordinarily insured against. It is settled law, that short of wilful negligence, which may amount to an overt act of felony, the insured is entitled to indemnity for his loss arising therefrom, that being one of the principal risks, to guard against which is the object of insurance. It matters not whether the fire, which causes the loss, be lighted improperly, or, after being properly lighted, be negligently attended, in either case the company will be liable.⁴

In Quebec, by legislative enactment,⁵ any alteration in the use or condition of the thing insured from those to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and which increases the risk, is a cause of nullity of the policy. If the alteration does not increase the risk, the policy is not affected by it.

In Ontario,⁶ Manitoba⁷ and British Columbia,⁸ by statutory condition, any change material to the risk, and within the control or knowledge of the assured, avoids the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent, and the company, when so notified, may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium,

¹ C.C.L.C. 2579.

² C.C.L.C. 2580; Angell 115; 2 Pardessus, n. 595, p. 493; B. A. Ins. Co. & Joseph, L. C. R. 448, *infra* § 349.

³ C.C.L.C. 2581; Pothier Ass., c. 1; 2 Par. 494; Ellis, 77; Ang. 111 *et seq.*; 1 Bell, Com. 540.

⁴ Johnston v. Dominion Ins. Co., 23 A.R. 739. MacLennan, 9. See also Pool v. Mil. Mech. Ins. Co., 65 N. W. Rep. 54 (1895), referred to *infra*, p. 556, note.

⁵ C.C.L.C. 2574; 3 Kent 374; 2 Par. n. 595; Boud. n. 119; 3 Par. n. 883.

⁶ 60 Vic., c. 36 (O), s. 168, ss. 3. ⁷ R.S.M. 1891, c. 59, stat. con. 3.

⁸ B. C. Ins. Policy Act, 1893, c. 12, stat. con. 3.

which the insured shall, if he desires the continuance of the policy, forthwith pay to the company, and if he neglects to do so, the policy is no longer in force.

The Ontario Insurance Act, 1897,¹ provides as follows as to what may and what may not form the subject of fire insurance :—

a Property which may be insured ² :—Dwelling houses, stores, shops and other buildings, household furniture, merchandise, machinery, live stock, farm produce, and other commodities.

b Property which may not be insured ³ :—Money, books of account, securities for money, and evidences of debt or title.

c Property which is not insured unless mentioned in the policy⁴ :—Plate, plate glass, plated-ware, jewellery, medals, paintings, sculptures, curiosities, scientific and musical instruments, bullion, works of art, articles of vertu, frescoes, clocks, watches, trinkets and mirrors.

The condition in a fire policy, that insured shall not keep ashes in a wooden vessel in or near the building insured, is not violated by the deposit of cold ashes in his building by the insured.⁵

In case of loss by fire, the insurer is liable for the whole amount of the loss not exceeding the sum insured, without deduction or average.⁶

But the sum insured does not constitute any proof of the value of the object of the insurance ; such value must be established in the manner required by the conditions of the policy and the general rules of proof, unless there is a special valuation in the policy.⁷ If the evidence leaves a certain amount of doubt as to the actual value of the buildings destroyed, the balance should be turned against the insurance company rather than against the insured.⁸ Insurers should exercise vigilance as to over-valuation when they are taking risks and accepting the premiums, rather than after the loss occurred and they are called upon to discharge their part of the obligation.⁹

It was said in *Equitable Fire Ins. Co. v. Quinn*,¹⁰ that an insurance company is responsible to the party whose stock in trade is

¹ 60 Vic., c. 36 (O). ² *ib.* s. 166. ³ *ib.* s. 168, ss. 6. ⁴ *ib.* s. 168, ss. 7.

⁵ *Mut. Ass. Co. of Montmagny & Charbonneau*, 16 R.L. 275, 15 Q.L.R. 86.

⁶ C.C.L.C. 2582.—*Peddie v. Quebec Fire Ass. Co.*, *Stuart's Reports* 174, K.B. (1824).—1 Ph. 375.—1 Bell, Com. 543.

⁷ C.C.L.C. 2575.—2 *Alauzet* 304.—*Angel*, 11—1 Bell, Comm. 542.

⁸ *Vide* rule *contra proferentem*, repeatedly referred to.

⁹ *Citizens Ins. Co. v. Lefrançois*, R.J.Q., 2 Q.B. 550, Q.B.

¹⁰ Q. B. 11 L.C.R. 170.

insured by them, for the actual market value of such stock at the time of the loss by fire, and not for the cost price thereof, or the sum which it may have cost the party insured to manufacture such stock, notwithstanding that the assured has not insured his profits upon the objects insured.

But in a recent Ontario case,¹ the insurance was against loss by fire to a stock of woollens and dry goods, which had cost \$96,522 to lay down in the warehouse. The policies expressly covered goods "sold, but not delivered." A fire having occurred, it was claimed by the assured that, for the purpose of fixing the sum to be paid by the insurance companies, the value of certain goods, which the assured had contracted to sell, must be held to be, not the cost price, but a greater sum which was to be arrived at in one of two ways, (a) by taking the price at which the assured had agreed to sell, \$33,186.00. (The companies had paid upon the basis of this price less 21 per cent.), or (b) by adding to the cost price the expenses incurred in purchasing and selling these goods; and it was claimed in the alternative that, even if the goods, contracted to be sold, had not all thereby acquired a new value, in any event the value of certain part of them, contracted to be sold for \$15,488, and which could not be duplicated in time to fill the orders, must be arrived at in one of the above ways suggested for arriving at the value of all the goods contracted to be sold.

The arbitrator, Mr. Justice Morgan, however, did not give effect to any of the plaintiff's contentions, but held, that the actual cash value was to be taken, and that such value was the cost of laying down the goods in the warehouse, not including travelling-buyers' expenses, nor any charges or expenses incurred in the business after the goods had passed into stock. The chief ground of his judgment was, if fire insurance companies were held liable for the difference between the cost of goods to a merchant and the selling price of such goods, it would practically be an insurance of the merchant against any bad debts caused by the insolvency of the buyers of his goods. This, the judge held, was not contemplated in the policy of insurance, or implied by its terms.

It has been held, that the measure of damages, recoverable by a tenant for life of the insured premises, is the full value of such premises to the extent of the sum insured.¹ And in a case where,

¹ In *re* Darling. Judgment at Toronto, 9 Jan'y, 1897.

by by-laws printed on the policy, defendant's liability was limited to two-thirds of the actual loss sustained, and the amount to be taken on one risk was restricted to \$2000, the plaintiff's loss was \$2,200, and the other insurance company paid the full amount of their liability \$1000, it was held, affirming the judgment of Falconbridge, J., that the plaintiff was entitled to recover as damages two-thirds of the balance of his loss, after deducting the amount of the other insurance.²

And in *McCuaig v. Quaker City Insurance Co.*,³ the court declared, that depression in the value of steamers generally, from circumstances which may have no reference to the original cost, etc., cannot be taken into account.

Where, by a condition of the policy, the insurers are in no case to be liable for any greater proportion of the loss than the amount insured by them bears to the total insurance on the property, they are entitled to have the claim reduced in accordance with such clause, though the other insurance be still unpaid and a contestation in relation thereto be still pending.⁴

In another action it was held, that in the case of certain undetermined quantities of ashes, belonging to different persons, damaged by water and subsequently destroyed by fire, each of the parties interested was bound to bear his proportion of the reduction made upon the amount insured, by reason of the loss caused by water, inasmuch as there were no means of ascertaining to whom the ashes damaged by water belonged.⁵

¹ *Caldwell v. Fire & Life Ins. Co.*, 11 S. C. R. 212.

² *McIntyre v. East Williams Mut. Fire Ins. Co.*, 18 O.R. 79, Ch. D., and see *Graham v. Ont. Mut. Ins. Co.*, 14 O.R. 358.

³ 18 U. C. Q. B. Rep. 131.

⁴ *Heron v. Hartford Ins. Co.*, M.L.R., 4 S.C. 388.

It was held in *Royal Ins. Co. v. McIntyre*, (Tex.) 35 L. R. A. 672, that, so long as the remnant of a building, which is left standing, is reasonably adapted for use as a basis, upon which to restore the building to the condition in which it was before injury, there is no total loss.

⁵ *Gilmour et al. v. Dyde et al.*, 12 L.C.R. 337, S.C. 1861.

In *Germania Fire Ins. Co. v. Deckard* (1891), 3 Ind. App. 361, 366; *Ill. Mut. Ins. Co. v. Hoffman* (1889), 31 Ill. App. 295; *Home Mut. Ins. Co. v. Roe* (1888), 71 Wis. 33; *De Graff v. Queen Ins. Co.* (1888), 38 Minn. 501, it was said, with reference to determining the liability of an insurance company, that ambiguous or contradictory provisions must be liberally interpreted and benefit of doubt be given to the assured. "Having indemnity for its object, the contract is to be construed liberally to that end, and it is presumably the intention of the insurer that the insured shall understand, in case of loss he is to be protected to the full extent which any fair interpretation will give."—In *Pool v. Mil. Mech. Ins. Co.*, 65 N. W. Rep. 54 (1895), referred

It has been held that, where the words in a condition in a policy are, "if the risk be increased or changed by any means whatever," the term "change" must be held to be used rather as a synonym of "increase," than as a word of different signification.¹

In *Ottawa & Rideau Forwarding Co. v. Liverpool & London & Globe Ins. Co.*² it was held, that change "of (or in) occupation," is different from "change in the nature of the occupation." But it was held, if the condition is directed against change of occupant, it must be enforced. The person in actual occupation may be material, and may have led to the making of the contract.

It has been held a violation of the policy to place a dangerous gas machine in the building assured, without the consent of the assurer.³

It was held in Quebec, in the case of a fire policy on buildings described as dwellings, endorsed to the effect, that "any change of occupation by which the risk is increased, must be notified in writing to the insurance company and endorsed on the policy, and that, in default thereof, the insurance shall be null and void," the change of occupation to a tavern, without notice to or consent of the company, did not render the policy void, when the jury stated in their special findings, that an intermediate change of occupation into a vinegar factory had been sanctioned by the company, and that the risk of the tavern was not greater than that of the vinegar factory.⁴

to *supra*, it was said that, whether the use of certain inflammable sulphur candles by insured, to fumigate the goods covered by insurance, increased the hazard by means within his control or knowledge, within the prohibition of the policy, is a question of fact for the jury.

¹ *Gill v. Canada F. & M. Ins. Co.*, 1 O.R. 341; *Ottawa Co. v. L'pl. & L'dn & Globe Ins. Co.*, 28 Q.B. 522, approved of.

² 13 L. N. 278.

A house being only occupied part of the time, was held in *Bishop v. Norwich Union F. Ins. Soc.*, 25 N. S. Law Rep. 492, not an occupancy within the meaning of the policy.

³ *Mathews v. Northern Ins. Co.*, 3 R.L. 450.

In *German Ins. Co. v. Hart*, 16 Ky. Law Rep. (1894), 344, it was held, that the use of a steam thresher near a barn did not vitiate the policy, and the fact that the fire was caused thereby, did not necessarily bring it within the prohibiting clause.

⁴ *Q.B., Campbell v. Liverpool & London & Globe Ins. Co.*, 13 L.C.J. 309.

In *Manch. F. I. Co. v. Guerin*, cited *supra* and *infra* (see Index), now in Supreme Court, it seems to have been assumed, confirming *Black v. National*, that a change of occupation does not affect the right of the mortgagee.

See also *supra* § 260, and *Martin v. Capital Ins. Co.* (1892), 85 Iowa 643, for a case of unauthorized use of building; the court holding that, where a policy contained

Unless formally stipulated, the insured is not bound to notify the insurer that he has hypothecated the things assured.¹

Where a second mortgagee insures in the name of the mortgagor, but loss payable to himself, the first mortgagee may require the money paid by the company to be applied to repairing, rebuilding or re-instating the property.²

An endorsement on a policy issued under the provisions of the Act 4 William IV., c. 33, consenting to the removal of the goods insured, from the building described in the policy to another building, and signed by the secretary alone, has been considered binding on the company.³

346. Loss by removal and theft at a fire.—As a rule, the conditions of a fire insurance provide for a ratable contribution on the part of the company for damages sustained in cases of removal of property to escape conflagration.⁴

Notwithstanding such conditions, however, the company was held responsible for the full amount in *Thompson v. Montreal Fire Ins. Co.*⁵ The court said, that ratable contribution was to be confined to mere expenses of any salvors, or expenses of saving what was saved, and that the clause in question gave the insured a remedy for something beyond compensation for his goods destroyed or injured in consequence of a fire.⁶

In the case of *Harris v. London & Lancashire Fire Ins. Co.*⁷ also, Meredith, C.J., charged the jury to follow the rule laid down by Mr. Justice Monk in the case of *McGibbon v. Queen Ins. Co.*,⁸ and afterwards followed by the Superior Court at Montreal, to

no express prohibition of a change in the use of the building, the fact, that it was used for a different purpose, did not avoid the policy, and the illegal sale of intoxicating liquors could not be said, as a matter of law, to increase the risk. "If the unauthorized use of the building increases the risk, it is entirely immaterial as to whether or not such use caused or contributed to the loss."

In *Mooney v. Glens Falls Ins. Co.*, 52 Legal Intell. (1895) 431, it was said, that abandonment of premises relieves company from liability.

¹ *Mut. Fire Ins. Co. of Richmond & Fee*, 14 Q. L. R. 293, 16 R. L. 461.

² See *Carr v. F. I. Co.*, 14 O. R. 487, and also R. S. O. 1887, c. 102, s. 4 (1).

³ *Q. B. Chalmers & Mutual Fire Ins. Co.*, 3 L. C. J. 2.

⁴ See *supra* §§ 248, p. 342 (5) & 260, p. 364. (xii). ⁵ 13 L. N. 334.

⁶ See also: *McLaren v. Comm. Un. Ass. Co.*, 12 A. R. 279, & see *Devlin v. Queen Ins. Co.*, 46 U. C. Q. B. 611, *supra*. Semble, that a fire policy, which is a contract of indemnity, carries with it, even irrespective of conditions to that effect, a provision that the insured shall not, with the fraudulent intention of throwing the loss on the insurer, wilfully cause or refrain from taking means within his power, to prevent the destruction of the insured property.

⁷ 10 L. C. J. 268, *infra*, p. 558. ⁸ *Ib.* 227, *infra*, p. 558.

wit:—"That the value of goods which, without any fault on the part of the insured, are lost or stolen during the confusion caused by a fire, or whilst being removed from the burning premises, ought to be borne by the insurers." In this last case, however, the fire occurred in an adjoining house, and the loss incurred by the insured was caused by removal only.

The general principle of law in the matter of theft at fires, where the policy is silent upon the subject, is as follows:—

"Loss by plunder of goods removed away from a fire and so put out of the control of the insured, in common practice is treated as directly incidental or consequent to the fire and covered by the policy."

But to meet this, most fire policies have a stipulation excepting all liability for theft at or after a fire upon premises covered by insurance, and such clauses are held valid in all cases.

In *McGibbon v. Queen Ins. Co.*,² the company was held liable for goods stolen at the fire; but, in the absence of satisfactory evidence that certain goods, the value of which is claimed, were either actually destroyed or damaged by fire or stolen, the claim cannot be recovered.

347. Damage by explosion—Definition of "gas."—A policy of fire insurance contained the following exception: "Neither will the company be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas." In the premises of the plaintiff (the insured), who carried on the business of extracting oil from shoddy, an inflammable and explosive vapor evolved in the course of the process, escaped and caught fire, setting fire to other things; it afterwards exploded and caused a further fire, besides doing damage by explosion:—

It was held, first, that the word "gas" in the policy meant "ordinary illuminating coal gas." Secondly, that the exemption of liability for loss by explosion was not limited to cases where fire was originated by the explosion, but included cases where the explosion occurred in the course of a fire, and that it exempted the defendants in respect both of the damage from the explosion itself and of the damage done by the further fire caused by the explosion.⁴

¹ Griswold, 581. ² 10 L.C.J. 227, *supra*, p. 557.

³ *Harris v. London and Lanc. F. Ins. Co.*, 10 L.C.J. 268, *supra*, p. 557.

⁴ *Stanley v. Western Ins. Co.*, 3 Ex. 71.

348. Clause as to forest fires.—A policy of insurance contained the following condition endorsed upon it, viz: "The company will not be answerable for any loss or damage by fire occasioned by earthquakes or hurricanes, or by burning of forests; and this policy shall remain suspended and of no effect in respect of any loss or damage (however caused), which shall happen or or arise during the existence of any of the contingencies aforesaid." Such a clause is legal, and in order to exempt the company from liability, it is only necessary to prove that, at the time of the loss, the neighboring forests were burning.¹

349. Identity of property.—The insurance being upon merchandise which is to be used for traffic, and not as property to be kept unchanged, the only identity of the subject of insurance needed is, that it shall be a stock of the same class of goods or not more hazardous, owned by the insured in that store. The removal of one stock and replacing it by another of like kind does not change the subject of insurance within the meaning of the policy.

Where a question arose as to the identity of the buildings destroyed with those insured, there being a number of buildings insured and only one burnt:—

It was held, reversing the judgment of the Court of Review, (1 L. C. J. 116), that the reception by the secretary of the company of a premium for additional insurance after the fire, was, under the circumstances, an acknowledgment of the plaintiff's pretensions.²

It has also been held, that a company insuring against fire the house, *hangar*, extension kitchen, and the furniture and effects of the insured, is liable for the loss on all goods on the premises wherever situate.

An insurance against fire, effected upon a certain quantity of coal, covers not only the coal deposited at the time, but that deposited since, and covers also the risk arising from the spontaneous combustion of such coal.³

A fire policy in favor of appellant on coal oil "his own, in

¹ Q.B., *Com. Union Ass. Co. & Canada Iron Mining Co.*, 18 L.C.J. 80.

² *Griswold*, 309 and see *supra* § 270a.

³ *Quenneville v. Mut. Ins. Co.*, 1 L.C.J. 116, 1866.

⁴ *Mut. Ass. Co. of Montreal v. Villeneuve*, M.L.R. 2 Q.B. 89, and see C.C.L.C. 2573.—2 Par. n. 594, p. 489; Ang. 101; Quen. n. 78.—See also *supra* § 270.

⁵ Q.B., *British Am. Ins. Co. & Joseph*, 9 L.C.R. 448, *supra* § 345.

trust or on consignment," covered his loss on oil destroyed by fire in "Middleton's sheds," warehouse receipts for which, granted by "Middleton in favor of Thomas Ruston," had been transferred by Ruston to appellant, and on which receipts appellant had made advances to Ruston, who obtained such advances really for Middleton, without appellant, however, being aware of the fact.¹

350. Waiver of conditions.—It is a well established rule, that a waiver of a forfeiture of a policy, in the absence of any agreement to that effect, results from negotiations or transactions with the insured, after knowledge of the forfeiture, by which the insurer recognises the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some expense and trouble.²

Where a policy contained a provision, that the ship insured should not be within the Gulf of St. Lawrence within a prescribed period, and the ship went into the Gulf within the prohibited time and was wrecked, notice was given of an abandonment and was accepted by the insurers, it was contended by them, that the ship was not insured when she was lost, as the insurance did not extend to a loss in the Gulf within the prohibited time, and that an abandonment can be of no avail where there is no insurance.

It was held, however, by the Privy Council, that the vessel was in fact insured, and that the loss occurred during the time and upon a voyage described in the policy, but there was breach of one of the warranties, and if, after a constructive total loss and notice of abandonment, the insurers, with full knowledge of all

¹ *Stanton v. Aetna Ins. Co.*, 17 L.C.J. 281.

A case, which was very strongly contested before the Supreme Court of the United States, was *Cal. Ins. Co. v. Union Compress Co.* (1890), 133 W.S. 337. The policy, issued to the compress company on "cotton in bales, held by them in trust or on commission," was effected under an agreement with the railroad companies. When cotton was delivered, the compress company gave receipts to the depositors stipulating "not responsible for any loss by fire." These receipts were exchanged by the holders with the railroad companies for the bills of lading, exempting the carriers from liability for loss or damage by fire. The contest here was, as to who were the beneficiaries of the policy. The insurance company contended, that there was error in treating the words "their own or held by them in trust or on commission," as if they read "on account of whom it may concern." The court held, that the insurance was really taken out by the railroad companies, which fact was well known to the agents of the insurer at the time the policy was issued, and that, therefore, the railroad companies had an insurable interest in the cotton, which was held in trust for them by the compress company.

² *Beach*, 753.

the facts, accept the notice, they cannot, when called on to pay the amount insured, resile and rely on a branch of warranty.

By the voluntary acceptance of the notice of abandonment, an agreement is entered into, which closes the whole matter.¹

In another case, the plaintiff having created a mortgage in favor of a loan company, whereby he covenanted to insure the building on the property, failed to insure, but assented to an insurance effected by the loan company in their own name, and he paid them the premium. The premises insured were described as a "two story house, shingle roof building, owned and occupied as a steam bending factory." The property having been destroyed by fire, the insurance company paid to the loan company the amount due to them and took an assignment of their mortgage, whereupon the plaintiff instituted proceedings against the insurance company, seeking to redeem the property on payment of what was due on the mortgage, after crediting the amount of insurance. It was shown that the premises, instead of being used as "a steam bending factory," had been converted into a "door and sash factory," of which change no notice had been given to the insurance company :—

It was held, reversing the judgment of the court below, that the special survey set out in the report, in which the intention to use the premises as a factory was mentioned, did not form part of the application of policy and could not be construed as an assent by the defendants to such occupation ; that the statutory condition as to change of occupation or use of the buildings, without notice to the insurance company, had therefore been broken, thus invalidating the policy ; and that the plaintiff was not entitled to any benefit thereunder.

It was also held, that the insurance company were at liberty to set up this defence, though, between them and the mortgagees, the policy was, by a subrogation clause therein, made unconditional.²

A company cannot, after negotiating with other companies as to their ratable proportion of loss, reject the claim pretending fraud, false representations, etc.³

¹ Privy Council, *Provincial Ins. Co. v. Leduc*, 6 P. C. App. Cas. 224.

² *Howes v. Dom. Fire and Marine Ins. Co.*, 8 A.R. 644.

³ *Sovereign Fire Ins. Co. of Canada v. Pruneau*, 14 R.L. 302, Q.B. 1885.

And where, after a fire, the insurers and the insured proceed amicably to an estimate of the loss, without requiring the observance of forms laid down in the conditions of the policy, and on which they had a right to insist, they will be held to have waived such formalities, and the report of the experts cannot be set aside for want of them.¹

351. Loss occurring within delay given for payment of renewal premium—Payment of premium after loss.—Under the Quebec law when, by the terms of the policy, a delay is given for the payment of the renewal premium, the insurance continues, and, if a loss occur within the delay, the insurer is liable, deducting the amount of the premium due. This rule applies to both fire and life insurance.²

There is a difference of judicial opinion on this point in Ontario.³

When a fire occurred on 13th September, on 15th September plaintiff, through a solicitor, paid the amount of an overdue

¹ Demontigny & Agric. Ins. Comp. of Watertown, 2 Q.B.R., 27 Q.B., 1881.

For leading American decisions on waiver of conditions see: *Weed v. Ldn. & Lanc. F. Ins. Co.* (1889), 116 N.Y. 106; *Grigsby v. German Ins. Co.* (1890), 40 Mo. App. 276, proof of waiver must show a distinct recognition of validity of policy.—*Phoenix Ins. Co. v. Maxon* (1891), 42 Ill. App. 164, statement of agent that vacancy would not affect liability of company is a waiver, if made before policy issued, but not if made afterwards.—*Nassauer v. Susquehanna Mut. F. Ins. Co.* (1886), 109 Pa. St. 507; *Wright v. F. Ins. Ass. of London* (1892), 31 Pac. Rep. 87, waiver, by action of company, of conditions regarding encumbrances.—*Mobile Life Ins. Co. v. Pruett* (1883), 74 Ala. 487, waiver of conditions as to payment of premium; here the court said, that "a policy of life insurance in the usual form is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premiums, but is an entire contract of insurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums, etc., and non-payment *ad diem* involves absolute forfeiture."—*Farnum v. Phoenix Ins. Co.* (1890), 83 Cal. 246, unconditional delivery of policy, containing formal receipt of premium, held a waiver as to actual payment.—*Knickerbocker Life Ins. Co. v. Pendleton* (1886), 112 U.S. 896, denial of liability a waiver of condition requiring proofs of loss or death.—*Everett v. Ldn. and Lanc. Ins. Co.* (1891), 142 Pa. St. 332, on estoppel to claim breach of conditions by reason of actions of adjusters.—*German-Amer. Ins. Co. of N.Y. v. Waters*, 30 S.W. Ry. (1895), 576, taking possession of property injured by fire does not waive a breach of the policy, when it is done in ignorance of the breach.—*Bernard v. United Life Ins. Ass'n*, 32 N.Y. Suppl. (1895), 223; 65 N.Y. St. Rep. (1895), 421, neither a solicitor nor a superintendent of agencies, working for commissions, can waive conditions, and the terms of a policy cannot be waived before it is issued.—*Rowe v. Brooklyn Life Ins. Co.*, 38 N.Y. Suppl. (1896), 621, waiver of lapse of life policy by replying to a letter as to paid-up value, etc.

² C.C.L.C. 2583, 2585. *Ellis* (Shaw's), 119 *et seq.*; *Angell*, 51; *Marshall*, 799, 800; 2 *Pardessus* n. 596; 1 *Bell, Com.* 540, 541, § 3. But see *Ellis* 249 *et seq.*, case of *Want v. Blunt*, (*Life Ins.*) 12 *East* 183.

³ See *supra* §§ 73, 78.

insurance premium note to defendants, who were ignorant of the loss. On 17th September, notice of loss was given to defendants, when they immediately returned the premium to the solicitor. It was held, that the payment, having been made in fraud of defendants, could not avail the plaintiff.¹

352. Reformation of contract—Mistake in amount of policy—Duration of contract.—In an action to recover the amount of a policy of life insurance, issued by the appellants, for the sum of \$2000, payable at the death of the respondent, or at the expiration of 8 years, if he should live to that time, the evidence showed, that the premium mentioned in the policy was the sum of \$163.44, to be paid annually, partly in cash and partly by the respondent's notes. The appellants, by their plea, alleged, that the insurance had been effected for \$1000, and that the policy had by mistake been issued for \$2000, that, as soon as the mistake had been discovered, they had offered a policy for \$1000, and that, previous to the institution of the action, they had tendered to the respondent the sum of \$832.97, being the amount due, which sum, with \$25 for costs (which had not been tendered), they brought into court. Since October, 1869, when a new policy was offered, the premiums were paid by the respondent and accepted by the appellants under an agreement that their rights would not thereby be prejudiced, and that they would abide by the decision of the courts of justice to be obtained after the insurance should have become due and payable. Parol evidence was given to show how the mistake occurred, and it was established, that the premium paid was in accordance with the company's rates for a \$1000 policy. The court decided, that the insurance effected was for \$1000 only, and that the policy had by mistake been issued for \$2000.²

¹ *Sears v. Agric. Ins. Co.*, 32 C.P. 585, C.P.D., and see *Frazer v. Gore Dist. Mut. Fire Ins. Co.*, 2 O.R. 416, p. 935. *Neill v. Union Mut. Life Ins. Co.*, 7 A.R. 171, p. 995. *Anchor Marine Ins. Co. v. Corbett*, 9 S.C.R. 73, p. 984.—See *Hamilton v. Home F. Ins. Co. of Omaha*, 61 N.W. Rep. (1894), 93, for effect of non-payment of premium note; see also *Croft v. Hanover Ins. Co.*, 21 S.E. Rep. 854 (1895) *supra*.—In *Scott v. Sun Fire Office* (1890), 133 Pa. St. 332, there was an endorsement on the back of the policy to the effect that "payment of the premium to a broker is not valid until received by the society." The court held that, where the premium was charged to the broker upon the books of the company's agent and, in regular course of business between the broker and the agent, was paid over to the latter, the policy was binding upon the company.

² Supreme Court of Canada, *Ætna Life Ins. Co. v. Brodie*, 5 S.C.R. 1. But see *Christmas & Borduas*, 15 R.L. 534. S.C. 1885, reported *supra* § 88. See also: *Harrison v. Hartford F. Ins. Co.* (1887), 30 Fed. Rep. 862, where it was said, that

In the case of *Maille v. Workmen Bakers' Union*,¹ defendants resisted payment of a claim, which was made upon them in consequence of the death of the wife of one of their members and of the subsequent death of the member himself, on the ground that the assured was suspended from all the advantages and benefits conferred by the society. The action was brought on behalf of the assured's minor child, and it was decided, that the regulations of the society as to suspension of members for neglect or delay in paying their contributions, did not apply to benefits accruing to the heir, but only to those of the member himself; and further, that suspension for a time does not deprive the member indefinitely, and if it were applicable to the case of death, it would only have the effect of delaying the payment of the amount of the assurance.

The question in dispute in an English case was, whether the entire day stated in the policy as date of expiration, was covered by the term of insurance. The facts as laid before the court were these :—

The plaintiffs insured their goods against fire with the defendants by a policy for six months, whereby it was provided from the 14th February, 1868, until the 14th August, 1868, and for so long after as the assured should pay the sum of \$225, and the defendants, at the time above mentioned, accept the same, the defendants' funds should be liable to make good losses by fire to the plaintiffs' goods. The plaintiffs intended to keep up this policy, and the defendants knew their intention, but the renewal premium was not demanded or paid on the 14th August, 1868. On that day a fire took place, which destroyed the plaintiffs' goods. The

unequivocal proof is necessary for reformation of policy. This was a case of misstatement as to vacancy; the policy was left with the agent for safe keeping, company was held not liable.—*Noel v. Pymatuning Mut. F. Ins. Co.* (1889), 130 Pa. St. 523; *Latimore v. Dwg. House Ins. Co. Pa.*, (1893), 25 Atl. Rep. 757, mistake in duration of policy.—*Devereux v. Sun Fire Office of London* (1890), 51 Hun. 147, rules recognised in New York on reformation of contract; "mistake must be established beyond a reasonable doubt."—*Steel v. Phoenix Ins. Co. of Brooklyn* (1892), 51 Fed. Rep. 715, no reformation of policy required to enable successor in a receivership to sue thereon.

¹ Pagnuelo, J., Superior Court of Montreal, 8th October, 1897, not yet reported.

The right to reinstatement after forfeiture of membership in a mutual benefit society, for default of payments, was held, in *Carlson v. Supreme Council American Legion of Honor* (Cal.), 35 L. R. A. 643, to be terminated by the death of the member without payment during the time allowed for reinstatement, and subsequent tender by the beneficiary within that period is unavailing.

course of business between the plaintiffs and defendants was, that the defendants should come to the plaintiffs and demand the renewal premiums :—

It was held that, under the terms of the policy, the whole of the 14th August was protected, and that the defendants were, therefore, liable for loss caused by a fire happening on that day.¹ And this case was followed in a recent decision.²

353. Subrogation.—It has been said, that the insurer does not, at common law, acquire by the payment of a loss a right in his own name to recover damages against the party by whose negligence and fraud the loss is caused.³

But it is now settled, that in all those cases, in which the assured have a primary right against third parties, who have been

¹ *Isaacs v. Royal Ins. Co.*, 5 Ex. 296.

² *South Staffordshire Tramways Co. v. Sickness and Acc. Ins. Asso.* (1891), 1 Q.B. 402.

In *Mich. Pipe Co. v. Mich. F. and M. Ins. Co.* (1892), 92 Mich. 482, the question was, as to when a fire risk attaches. The agent disregarded his instructions to report the insurance at once. A fire occurred a few days later and the policies were received by agent of assured several days afterwards. Cheque for premiums, sent to agent over a month later, was not accepted, in obedience to instructions. The policies contained no provision, that they should not become operative until the premiums were paid. In a similar case before, the premiums had, in the usual course, been collected afterwards. The majority of the Supreme Court of Michigan held, there was a valid contract existing at the time of the loss.

Whiteman v. Am. Central Ins. Co. (1884), 14 Lea 327, was also a case turning on the question of attachment of risk. There were several policies issued to a firm composed of a father and two sons; one company wished to cancel its policy; a policy in another company was substituted, issued to the father, loss payable to the firm; this substitution was assented to by one of the sons, but the policy was not delivered to the father until after a fire. The company contended, that its policy had not been delivered at the time of the fire, and, therefore, the risk had not attached on its account. The court held, that the substitution was completed by the assent of one of the partners and, further, that the agents of the company, having sent the substituted policy to the broker, constituted the latter the agent of the company to deliver the policy, and they were bound by his acts.

In *Fuchs v. Germantown Farmers Mut. Ins. Co.* (1884), 60 Wis. 286, it appeared, that a policy had been issued and, the year following, renewed, about ten days after the commencement of the risk as stated therein. The property was destroyed by fire 6 days after the expiry of the renewal. It was held, that the policy had expired.

³ *London Ass. Co. v. Sainsbury*, 3 Doug. 245. May, 453.

In *Conn. Mut. L. Ins. Co. v. New York & New Haven R. R. Co.*, 25 Conn. 265, where the insurance company had paid a claim for a death, caused by the negligence of the railroad company, the court dismissed the action on two grounds: first, because at common law a party is not liable *civilliter* for the destruction of human life (for which see *Mobile Ins. Co. v. Brame*, 95 U.S. 754, & *Sullivan v. Union Pac. R. R. Co.*, 3 Dill. C. Ct. 334), and, secondly, on the special ground, that there is no such relationship between the parties as to lay a foundation for such an action.

the authors of the injury, either through negligence or culpable misconduct, not amounting to felony, the insurers, on making good the loss, are entitled to enforce the remedy of the assured and in their name to recoup themselves for their expenditure. This right is recognized by the courts as the right of subrogation. The contract of insurance is treated as an indemnity, and the insurer as a surety, who is entitled to all the remedies and securities of the assured, and to stand in his place.¹

When a person, who has suffered loss by fire and has been paid by an insurance company, sues the wrong-doer, he is entitled to judgment for the full amount of his loss; the insurance money is not to be deducted, because if it were, it would give the wrong-doer the benefit of the insurance.²

A fire insurance company, by whom a loss has been paid, has no *locus standi* as co-plaintiff in an action by the assured against the wrong-doer whose negligence has caused the fire.³

In so far as Quebec is concerned, the right of subrogation is provided for by statute, the code stipulating, that the insurer, on paying the loss, is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused.⁴

Assurers against fire have, therefore, a legal right, on paying the loss covered by their policy, to be subrogated in the rights and actions of the insured.

A *marguillier en charge*, having power to receive from the assurers the sum insured on the property of the *fabrique* and to grant a discharge therefor, has also the power to subrogate the assurers in the rights and actions of the *fabrique* against the originators of the fire and loss, although he cannot legally make an assignment by way of sale of any such rights and actions, without special authority.

Assurers subrogated, on payment of the loss, in the rights and actions of the assured for a part of the loss only, can maintain an action against originators of the fire and loss for such part. Under a plea of general issue to an action for a part of the loss only, the

¹ May, 454.

² Brown v. McRae, 17 O.R. 712; but see *infra* Howes v. Dom. F. & M. Ins. Co., 8 A. R. 644.

³ Wealleans v. Canada Ins. Co., 21 A. R. 297; MacLennan, 96; but see in Quebec, North Shore Ry. & McWillely, *infra*.

⁴ C. C. L. C. 2584. Ellis (Shaw's), 112, n. 1; Marshall, 796; 2 Pard. Drt. Com., n. 595, p. 498-500, as to subrogation *pleno jure*. See also *supra* §§ 189 *et seq.*

originators of the fire and loss cannot require that the other parties, injured by the same fire, be united in the same action, so as to save them from the costs of more than one action for the whole loss.¹

The hypothec upon a property does not pass to the indemnity in the hands of an insurer against fire.²

The pretension of the existence of such a *gage* has not been allowed in the American courts.³ In France, the authors have been somewhat divided in opinion. The *Cour de Paris*, 13th March, 1837, allowed the *gage*, but the *Cour de Cassation* decided against the pretension on 20th December, 1859.⁴ Following this decision and approving of it, we have an article on the subject in the *Revue Critique*; ⁵ and the *Cour de Douai*, 2nd December, 1869,⁶ followed the *Cour de Cassation*.

A railway company is responsible for damages caused by one of its locomotives setting fire to a building, and a single action can be taken by the owner of the buildings and by the insurance company which has been subrogated for part of the damage it has paid.⁷ In Quebec, where no transfer of the insured's rights is made to the insurer at the time the loss is paid, the latter cannot invoke against the originator of the loss Art. 2584 C. C. But he has the action for damages under Art. 1053 C. C.⁸

In case of partial insurance, where a third party is liable to make good the loss, the insured is not clothed with the full character of trustee *quoad* the insurance companies, until he has recovered sufficient from the wrong-doers to fully satisfy all his

¹ Privy Council, Quebec Fire Ins. Co. & Molson, 1 L.C.R. 222 (not reported in Moore's P. C. Rep.)

² Belanger v. McCarthy, 18 L.C.J. 138.

³ Phillips on Insurance, Vol. 1, N. 405; Vol. 2, N. 1962.

⁴ Sirey (1860), 1, 24, and J. du Palais (1860), 146.

⁵ Paris, 17, p. 450.

⁶ Sirey (1870) p. 295, 2nd part.

In the volume of Sirey, 1870, the editor says in a foot note, "c'est là un point aujourd'hui généralement admis," and Troplong, Hypothèques, Tom. 4, n. 800, speaking of the parallel case of a hypothec on a house, says:—"Je ne conçois pas comment on peut trouver dans ce cas une difficulté. L'hypothèque est éteinte par la perte de la maison: *re corporale extincta, hypotheca perit*. Comment donc pourrait-elle atteindre la somme, qui n'est allouée que *ex post facto* à titre d'indemnité pour le propriétaire? D'ailleurs, cette somme d'argent est purement mobilière; elle n'est et ne peut être subrogée à la maison, d'après tous les principes sur la subrogation.

⁷ Q.B. North Shore Ry. & McWilly, 17 R.L. 367. M.L.R. 5 Q.B. 122. 34 L.C.J. 55. Supreme Court of Canada, 17 S. C. R. 511.

⁸ Cedar Shingle Co. & Rimouski Ass. Co., R.J.Q., 2 Q.B. 379.

loss as well as expenses incurred in such recovery. In other words, when the assured is put in as good a position by the recovery from the wrong-doer, as if the damage insured against had not happened, then, for any surplus of money or other advantage recovered over and above that, the insurer is entitled to be subrogated into the right to receive that money or advantage to the extent of the amount paid under the insurance policies.¹

To give rise to an action *en garantie simple*, not only must there be connexity between it and the principal demand, but the two actions must be identical in their nature and based upon similar legal principles. So, where an insurance company is sued upon a policy of fire insurance for the amount of a loss, an action *en garantie* by the insurance company will not lie against the railway company, through whose alleged fault and negligence the fire occurred, the liability on which the action is based in the two cases being entirely dissimilar in nature and principle.²

The question of subrogation is a very important one to insurance companies and has been frequently ventilated in the English courts in its various aspects. Thus, in an action between landlord and tenant, it was laid down, that a policy of fire insurance is a contract of indemnity, and, upon payment of the amount of loss, the insurer is entitled to be put into the place of the assured; and if, at a subsequent time, the assured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him.—*North Brit. & Merc. Ins. Co. v. London & Liverpool & Globe Ins. Co.* (5 Ch. D. 569) commented upon and followed.³

And where the owner of a building insured it against fire, but not to the full value, and the building was burned by what was said to be the negligence of the servants of a municipal corporation, the owner brought an action for damages against the corporation, and the court held, affirming the order of the Master of the Rolls, that the owner, undertaking to sue for the whole amount

¹ See *Howes v. Dom'n Fire & Mar. Ins. Co.*, 8 A.R. 644; *Clarke v. Union Fire Ins. Co.*; claim of *Agricultural Ins. Co. of Watertown*, 6 O.R. 640. See *National Fire Ins. Co. v. McLaren*, 12 O.R. 682.

² Q.B. *Central Vermont Ry. Co. & Mutual Fire Ass. Co. of Montmagny*, R.J.Q. 2 Q.B. 450, but see *North Shore Ry. & McWilly*, M.L.R. 5 Q.B. 122, *supra*.

³ *Darrell v. Tibbitts*, 5 Q.B.D. 560.

of damage, would be allowed to conduct the action without the interference of the insurers, but would be subject to liability were anything done by him in violation of any equitable duty towards the insurers.¹

In another action it appeared, that by floating policies of insurance, effected by B. & Co., wharfingers, they insured against loss or damage by fire, in the sums named, grain and seed, the assured's own or on commission, for which they were responsible, subject to conditions of average and to the condition that "if at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, the company shall not be liable to pay or contribute more than its ratable proportion of such loss or damage." While these policies were subsisting, a fire destroyed a quantity of grain stored with B. & Co., part of which belonged to R. & Co., who had also effected policies, called "merchants' policies," on the grain thus destroyed, including also grain stored elsewhere, which policies contained the like condition as the wharfingers' policies. B. & Co. were paid in full by the several insurance companies. In a suit to determine the liability of the companies *inter se*, it was held, affirming the decision of the Master of the Rolls, that the granters of the merchants' policies were not liable to contribute to the loss; that B. & Co. were primarily liable, but, being indemnified by the granters of the wharfingers' policies, the latter were ultimately liable; and it was also held, that the condition as to double insurance only applied to cases where the same property was the subject matter of insurance and where the interests were the same.²

In another English case it was stated, that, according to the doctrine of subrogation as between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by

¹ Commercial Union Ass. Co. v. Lister, 9 Chy. 483.

² North British & Merc. Ins. Co. v. L'pool & London & Globe Ins. Co., 5 Ch.

the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss, against which the assured is insured, can be or has been diminished. The case in question was as follows :—A vendor contracted with a purchaser for the sale, at a specified sum, of a house, which had been insured by the vendor with an insurance company against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date of completion, the house was damaged by fire and the vendor received the insurance money from the company. The purchase was afterwards completed and the purchase money agreed upon, without any abatement on account of the damage by fire, was paid to the vendor :—

In an action by the company against the vendor, the court declared, that the company were entitled to recover a sum equal to the insurance money from the vendor for their own benefit.¹

A similar case² was based upon the following facts :—A vendor contracted with a purchaser for the sale of a house, which had been insured by the vendor against fire. The contract contained no reference to the insurance. After the date of the contract but before the time fixed for completion, the house was damaged by fire and the vendor received a sum of money from the insurance company. It was held by Brett & Cotton, L.JJ. (affirming the decision of Jessel, M. R.), James, L.J., *dissentiente*, that the purchaser, who had completed his contract, was not entitled as against the vendor to the benefit of the insurance.—Per Brett & Cotton, L.JJ., whether the office could not compel the vendor to refund the money, *quære*. But this *quære* was settled in the preceding case.

¹ *Castellain v. Preston*, 8 Q.B.D. 613. 11 Q.B.D. 380.

² *Rayner v. Preston*, 18 Ch. D. 1.

The principles of subrogation, as given in the above paragraphs, were illustrated in a number of American cases ; *e.g.*, *Prov. Wash. Ins. Co. v. The Sydney* (1885), 23 Fed. Rep. 88, as to assurer being equitably entitled to subrogation.—*Phoenix Ins. Co. v. Erie Transp. Co.* (1886), 117 U. S. 312, a leading case on the right of subrogation, where it was said that “in any form of remedy, the insurer can take nothing by subrogation but the rights of the assured.”—*Platt v. Richmond York River & Chesapeake R. R. Co.* (1888), 108 N. Y. 358, “if the assured has no right which he can transfer, there can be no subrogation.”—*London Guar. & Acc. Co. v. Geddes* (1885), 22 Fed. Rep. 630, guarantee company being subrogated to the rights of the employer ; embezzlement by ticket agent of a Canadian railway company ; *capias ad respondendum* in Illinois.—*Phoenix Ass. Co. v. Allison et al.*, 30 S. W. Rep. (1895), 547, as to subrogation of debtor to rights of his sureties upon payment of debt.—*Southern Bell Telephone and Telegraph Co. v. Watts*, 66 Fed. Rep. (1895) 460, an insurance company is not a party-plaintiff.—See also *Houston Direct Navigation Co.*

354. Slip of policy—Effect of.—The plaintiffs, a firm of merchants in New Zealand, in October, 1886, employed a firm of insurance brokers in London to effect for them insurances against fire upon goods in New Zealand. The brokers instructed B., an insurance broker at Lloyd's, to effect a portion of the insurances, and B. prepared a slip, containing particulars of the risk, which was initialled by the defendant and other underwriters at Lloyd's. Owing to misunderstanding between the insurance brokers, no policy was put forward for signature by the defendant and other underwriters, and in February, 1887, the goods in New Zealand were seriously damaged by fire. No premiums had then been paid, but two days after the fire the insurance premiums were paid by the plaintiffs to the insurance brokers. A policy was then tendered to defendant for signature, but he refused to sign or pay the amount for which he had initialled the slip. In an action to recover the amount, the court decided, that the slip formed a complete and binding contract of insurance, that it was not subject to an implied condition, that a policy should be put forward for signature within a reasonable time, and that, in the absence of circumstances showing an intent on the part of the plaintiffs to abandon the insurance, they were entitled to recover.¹

355. Insurance against fire of a steamship in dock does not cover it while moored in the river.—A time policy against fire was effected on a steamship. The policy described it as then "lying in the Victoria Docks," but gave it "liberty to go into dock and light the boiler fires once or twice during the currency of this policy." The only dry dock into which the ship could go was Lungley's dock, at some distance up the river. To go there it was necessary to remove the paddle wheels; they were removed in Victoria Dock and the ship then towed up to Lungley's dock. The necessary repairs there having been completed, the ship was brought out and moored in the river, preparatory to replacing the paddle wheels. This operation could have been perfectly performed in the Victoria Dock, but it was found, that in such case it was customary, as the more economical course, to replace the

v. Ins. Co. of N. Am., 31 S. W. Rep (1895) 500; *Over et al. v. Lake Erie & W. R. R. Co. et al.*, 63 Fed. Rep. (1894), 34; *Stoughton v. Manuf. Natural Gas Co.*, 30 Atl. Rep. (1895), 1001; *Matthews v. St. Louis & S. F. R. Co.*, 24 S. W. Rep., 591.

¹ *Thompson v. Adams*, 23 Q.B.D. 361, and see *supra* chap. V.

paddle wheels while the ship lay in the river. Before the wheels had been replaced the ship was burned :—

It was held, that the policy covered the ship while in the Victoria Docks, and while passing from them to the dry dock, and while directly returning from the dry docks to the Victoria Docks ; but it did not cover the vessel while moored in the river for a collateral purpose.

Per Lord Chelmsford : An insurance against fire necessarily has regard to the locality of the subject insured.

Per Lord O'Hagan : To construe the policy as allowing the vessel to remain in the river while the paddle wheels were replaced, would be to add a new condition to the policy, which could not be done.¹

356. Place of payment—Lex loci contractus—Payment into court.—Where no place of payment of a policy of insurance is mentioned in the policy, it must be assumed that the place of payment is where the head office of the insurance company is situated, and this fact may determine the question of the *lex loci contractus*.²

Payment into court by the insurance company may be made in certain cases.³

357. Divisible surplus—Discretion of actuary and directors.—The plaintiff insured with the defendants upon their “endowment participating plan” and, by the contract of insurance, the defendants agreed to pay him at the end of a specified period, if he survived, a certain sum together with his share of the profits made in that branch of the business during the period. The plaintiff, being dissatisfied with the share allotted to him, claimed an account and payment of his share of all the profits. The defendants claimed the right to hold a portion of their apparent surplus to ensure the future stability of the company :—

The court was of opinion, that the plaintiff was bound to acquiesce in the discretion of the actuary and directors of the company, *bona fide* exercised, and to take his share of what was

¹ *Pearson v. Com. Union Ass. Co.*, 8 C. P. 548. 1 App. Cas. 498. See also *supra* § 273.

² *Clarke v. Union Fire Ins. Co.*, 10 P.R. 313, cited *supra* § 92 ; see S.C. 6 O.R. 233 and see *supra* § 93.

³ *Merchants Bank v. Monteith ex parte Standard Life Ins. Co.*, 10 P.R. 588. *Peoria Sugar Refg. Co. v. Can. Fire and Marine Ins. Co.*, 12 A.R. 418.

apportioned as divisible surplus; and that being so, that his case was not advanced by statements made by officers of the company in letters or pamphlets as to the course pursued by them in dividing the surplus.¹

Chancellor Boyd said, that the representation made that participating policies "would receive the equitable share of the divisible surplus," points to the exercise of the discretion of the managers of the company, and the expression "divisible surplus," is one that refers to something less than the entire profits claimed by the plaintiff. Before divisible profits can be ascertained, it would seem to be essential for the security of policy-holders to keep such resources in hand as would cover the whole liabilities of the company, having regard to the uncertain chances of mortality, rate of interest, expenses, etc.

Meredith, J., was of opinion, that there was no express covenant in the policy to pay the plaintiff any profits. "Divisible profits" are the profits which the company, after making, in good faith, all reasonable and proper provision for its safety and prosperity, divide among policy-holders.²

358. Title to life insurance policy.—An army agent, to whom an officer was largely indebted on the balance of his account, effected in his own name policies on the life of the officer, and, in the books kept by the army agent, the account of the officer was charged with the premiums paid and with interest on the balances including the premiums. The officer was aware that the policies had been effected, but there was no evidence that the account had ever been shown to him, or that he knew that he was in the account charged with the premium:—

It was held, reversing the decree of James, V.C., that the army agent was, under the circumstances, entitled to retain the sums received upon the policies after the death of the officer, and was not liable to account for them to his representatives.³

On the sale of an annuity for the life of the grantor, it was provided, that the grantor would appear at an insurance office for the purpose of having his life insured, and would, if he went beyond

¹ *Bain v. Aetna Ins. Co.*, 20 O.R., 6 and see *Confederation Life Ass. v. City of Toronto*, 24 O.R. 643.

² *Idem*, 21 O. R. 233.

³ *Bruce v. Garden*, 8 Eq. 430; 5 Ch. 32.

See also *supra* chap. VI.

the seas, pay any extra premiums which might be occasioned thereby; and it was further provided, that the grantor might at any time repurchase the annuity for the sum which was originally paid for it. The purchaser of the annuity insured the life of the grantor and paid the premiums on the policy of insurance. The grantor repurchased the annuity :—

It was decided, that the grantor of the annuity was not entitled to have the policy of insurance assigned to him.¹

It was held in England, that the grant of an annuity, with a right of repurchase on payment of the consideration money and all arrears of the annuity, did not create the relation of debtor and creditor so as to give the grantor, upon repurchase of the annuity, the right to a policy effected by the grantee on the life of the grantor as a security of indemnity; or, after the death of the grantor, to entitle his representatives to the surplus proceeds of the policy after satisfaction of the consideration money and all arrears of the annuity. In 1822, in consideration of £600, A. and B., his wife, granted to C. annuity of £64. 7s. 6d. for ninety-nine years, if B. should so long live. By the same deed the rents of copyhold property, to which B. was entitled, were granted during her life to C. with a covenant to surrender from and after B.'s death to the use of C. and power to C. to sell in case the annuity should be in arrear. The deed contained provisions, that any extra premiums to become payable at the office where B.'s life should be insured, should be paid by A. and a power to A. to repurchase the annuity at any time after three years, on payment to C. of £600 and all arrears of the annuity. On the day before the date of the deed, by which the annuity was granted, C. insured B.'s life for £600 at an annual premium of £16. 7s. 6d. The copy holds were surrendered, and C. by himself or his representatives since his death, had been in possession since 1828. A. died in 1858 and B. in 1869 :—It was held, as between the representatives of C. and B., that the surplus proceeds of the policy effected by C. on B.'s life, after satisfaction of the £600 and all arrears of the annuity, belonged to the representatives of C. and not of B. *Gottlieb v. Cranch* (4 D.M. & G. 440) and *Knox v. Turner*, (Law Rep. 5 Ch. 515) followed.—*Lea v. Hinton* (5 D.M. & G. 546) *Courtenay & Wright* (2 Giff. 337) were discussed in this case.²

¹ Decree of Stuart, V.C., affirmed. *Knox v. Turner*, 9 Eq. 155; 5 Ch. 515.

² *Preston v. Neele*, 12 Ch. D 760.

A father effected a policy in the name and on the life of his son, in which he had no insurable interest, under circumstances which satisfied the court that he intended it for his own benefit. The son died intestate and the father took out administration to his estate and the insurance company paid the money assured by the policy to him :—

Held, affirming the decision of Bacon, V.C., that although, as between the insurer and the company, the policy was illegal and void under the 14 Geo. III. c. 48., yet, as between the father and the estate of the son, the father was entitled to retain the money for his own benefit.¹

The plaintiff's wife being entitled under a will to £200 on attaining her majority, the trustees of the will agreed to advance the £200 to the plaintiff on his obtaining a surety for the repayment in the event of the wife dying under 21. A person became surety on condition that insurance was effected on the life of the wife. The £200 was advanced, and an insurance effected by the plaintiff in the name of the wife on her own life :

The court declared that, as the plaintiff was primarily interested in the policy, it was illegal and void by force of 14 Geo. II., 48, s. 2, which renders it unlawful to make a policy without inserting the names of the persons interested therein.²

358a. Application for life insurance accepted by company—Material alteration of risk before tender of premium.—A proposal was made to an insurance company for an insurance on the life of the proposer who made, on a form issued by the company, statements as to his state of health and other matters and a declaration, that the statements were true and were to be taken as the basis of the contract. The proposal was accepted at a specified premium, but upon the terms that no insurance should take effect until the premium was paid. Before tender of the premium there was a material alteration in the state of the health of the proposer, and the company refused to accept the premium or to issue a policy :—

¹ *Worthington v. Curtis*, 1 Ch. D. 419.

See also *supra* chap. VI.

² *Evans v. Bignold*, 4 Q.B. 622.

In *Adams v. Reed* (Ky.), 35 L. R. A. 692, it was decided, that an insurable interest in the life of a son-in-law exists in favour of a woman who with him, as one family, keeps a boarding house, dividing the profits between them.

The court was of opinion, that the nature of the risk having been altered at the time of the tender of the premium, there was no contract binding the company to issue a policy.

Quaere: Whether, if there had been no alteration in the risk, the company could have been legally entitled to refuse to accept the premium and to issue a policy.¹

358b. Life insurance policy lost—Decree of court.—It was held in England, that an insurance company, paying under a decree of the court the money payable under a lost policy, is sufficiently indemnified by the decree and is not entitled to any indemnity from the persons to whom the money is paid.²

358c. Surrender value of life policy not changeable.—The surrender value of a policy of insurance is everywhere the same and is not subject to an arbitrary decision of the company fixing it at a less sum in a foreign country than that provided by the condition of the policy.³

358d. Presumption of death from absence for seven years.—A policy on the life of R. Nutt was granted in 1863. An action was brought upon it in 1874, and the question was, whether Nutt was then alive or dead. He had been absent from his former home for more than seven years, having left it in 1867. His sister and brother-in-law, who lived where he had formerly lived, gave evidence of his absence and said, that they had not heard of him for more than seven years. On cross-examination they said, that a niece of his had said that, when she was in Melbourne in December, 1872, or January, 1873, she saw a man whom she believed to be her uncle, Nutt, but he was lost in the passing crowd, before she was able to get to speak to him. No effort appeared to have been made to find him at Melbourne, and the other relatives believed the niece to have been mistaken. The jurymen expressed

¹ Canning v. Farquhar, 16 Q.B.D. 722.

² England v. Lord Tredegar, 1 Eq. 344.

³ Vennor v. Life Association of Scotland, 30 L.C.J. 303, Q.B. 1886.

As to construction of non-forfeiture clause by United States Supreme Court, see *Knapp v. Homoeopathic Mut. Life Ins. Co.* (1886), 117 U.S. 411, where the policy was declared forfeited for want of making election within a certain time.—See also *Alabama Gold Life Ins. Co. v. Thomas* (1883), 74 Ala. 578, for policy being forfeited on account of non-payment of note and interest thereon.—*Fowler v. Metrop. Life Ins. Co.* (1886), 41 Hun. 357, and *South. Mut. Life Ins. Co. v. Montague* (1887), 84 Ky. 653, where it was said, that statements in pamphlets as to payment of premium were binding upon the company, and the latter could not claim forfeiture of policy.

a similar opinion. The judge directed the jurymen, that they "could not say that the man had not been heard of during the last seven years, when one of his relatives declared, that she had seen him alive and well within the last three years; and still less could they say that he had never been heard of, when all the members of the family stated, that they had heard what she had stated," and "that the ground for the presumption of death from a man having been absent for seven years was entirely removed by the direct evidence, that every relative had heard that he was alive." And, lastly, His Lordship said to the jury: "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove exactly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendants."

The Court of Appeal had considered this to be a misdirection and had ordered a *venire de novo*.

On appeal to the House of Lords, the Lords were equally divided, and so the decision of the Appeal Court stood affirmed:—

Per Lord Blackburn: When there is a case tried before a judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the judge is to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts. Farther than that it is not necessary for him to go.¹

359. De facto directors—Persons falsely assuming to carry on company.—A person who effects a policy with a life assurance company in the ordinary course of business, is not bound to enquire whether the persons signing the policy as directors have been legally appointed directors, or are empowered to use the seal of the company. It is sufficient if the policy appears, on the face of it, to be consistent with the articles of association of the company and the Acts of Parliament under which it is incorporated.

A life insurance company was registered in 1863, and, by the

¹ Prudential Ass. Co. v. Edmonds, 2 App. Cas. 487.

As to presumption of death upon disappearance of the assured, *vide* for Quebec law, C.C.L.C. 93 *et seq.*, and see Northw. Mut. L. Ins. Co. v. Stevens *et al.*; Bankers L. Ass'n of Minn. v. same, 25 Ins. L. J., 292 (1896).—Martin v. Union Mut. L. Ins. Co., 43 Pac. Rep. (1896), 53.—Straub v. Grand Lodge A.O.U.W. of N.Y., 37 N.Y. Suppl. (1896), 750.—In re Mut. Benefit Co., Appeal of Schoneman, 34 Atl. Rep. (1896), 283.

articles of association, one P. was appointed managing director, but the directors, who were named in the articles and signed the memorandum of association, refused to act and passed a resolution, that the company should not carry on business or allot shares. Notwithstanding this resolution, P. and one of the shareholders persisted in carrying on the business at the registered office of the company and allotted shares and appointed directors. A stranger effected a policy at the company's office, which was signed by three of the *de facto* directors and sealed with what purported to be the company's seal :—

It was held, affirming the decision of the Master of the Rolls, that the policy was binding on the company.¹

360. Remittance by agents in excess of balance due—Renewal of lapsed policies, although there was no specific appropriation.—Where the plaintiffs, being agents for an insurance office, remitted to it £100 for premiums, and it appeared that the £100 was, to the knowledge of the office, in excess of what they owed as agents, and that the terms on which lapsed policies should be renewed by the office for their benefit had been ascertained by consent :—

The court held, that, although there was not in the office any specific appropriation of any part of the £100 to the payment of the premiums on the lapsed policies, yet that it must be taken to have been received on account thereof, and that, from the date of receipt, there was a good contract for the renewal of the old insurances.²

361. Payment ex gratia of loss by explosion—Liability of directors.—Loss from breakage by distant explosion, being a loss by concussion, is not covered by ordinary policies.³

The case of *Taunton v. The Royal Ins. Co.*,⁴ which arose out of the explosion of the ship "Lotty Sleigh," raised a question of importance as to the discretion of directors of an insurance company to make good losses not covered by the policies of insurance.

On the 15th of January, 1864, the "Lotty Sleigh," then lying at anchor in the Mersey, with a large quantity of gunpowder on board, caught fire and blew up. The concussion of the air pro-

¹ In re County Life Ass. Co., 5 Ch. 288, and see *supra*.

² Kirkpatrick v. South Australian Ins. Co., 11 App. Cas. 177.

³ *Everett v. London Ins. Co.*, Jurist (1866), 311; *ib.* (1865), part 1, 546.

⁴ Before the Vice-Chancellor's Court, Feb. 20, 1864; referred to *supra* § 49a.

duced by the explosion of the gunpowder caused great damage to property for several miles around, and in particular shattered the windows of several houses and manufactories in Liverpool and Birkenhead. Many of the persons whose property was thus injured were insured in the Royal Insurance Company. The directors, acting upon what they termed a liberal construction in favour of the insured, had come to the determination to pay all losses consequent on the explosion which had been sustained by parties insured with the company, and had already paid claims for small sums to the amount of 960*l*. The plaintiff, who was a shareholder in the company, protested against any application of the funds to make good these losses, on the ground that they were not within the terms of the policies, which contained a distinct provision that the company would not "be responsible for any loss or damage by explosion, except for such loss or damage as shall arise from explosion of gas." He, accordingly, filed a bill to obtain a declaration, that the application of the funds in making good any loss occasioned by the explosion to persons insured against loss or damage by fire was unauthorized and improper. The bill also prayed an injunction to restrain any such payments, and that the directors might be declared personally liable to make good any payments already made by them.

The directors submitted that, although the losses in question were not strictly within the terms of the policies, they had exercised a wise discretion in at once offering to satisfy the claims as a matter of favour, without admitting any liability, believing as they did that such a course was much more conducive to the real interests of the company than a narrow-minded adherence to the strict letter of the provisions contained in the policies. They had obtained the concurrence of a majority of the shareholders to the course taken by them, and the principal insurance offices, such as the Sun, the Phoenix, the Royal Exchange, and the Alliance, had taken the same view, and voluntarily paid the losses occasioned by the explosion. The Vice-Chancellor said, that the question was one of considerable importance as to the management of companies of this description. The court was extremely careful to prevent the application of money intrusted to directors by the shareholders for any other than the legitimate purposes of the business. At the same time, it would not be for the benefit of shareholders that those purposes should be impeded or narrowed.

Looking at the provision excluding payment for damages occasioned by explosions, except explosions by gas, he was strongly of opinion, that the policies would not cover the loss occasioned by the particular accident. The directors themselves thought, that they were under no legal liability, but professed to make the payment *ex gratia*, and in order to promote the interests of the company. Could not, then, the whole body of shareholders sanction such a payment? The damage having been occasioned by something analogous to, though not falling within, the risks insured against by the policy, the question was, whether the company were not entitled, by way of preventing any complaint, or litigation, to make good these small losses, rather than incur the risk of being damaged in reputation as an illiberal office.

Upon this question, the evidence of the mode of carrying on business by companies of this nature was very material. It appeared, that other offices were in the habit of acting liberally in respect of claims of this description not falling strictly within the terms of the policies. Looking at the usage in this respect, there was nothing extreme or unreasonable in the conduct of the company in determining that these losses should be paid. He could have very little doubt, that the course taken by the directors, and approved by the majority of the shareholders, was conducive to the welfare of the company, and likely materially to promote its interests. Upon the whole, therefore, the plaintiff was not entitled to a decree, and as he had not come here to secure any benefit to the company, the bill must be dismissed with costs.

362. The effect of war.—The subjects of two states at war cannot make a valid contract of insurance during the war,¹ and an insurance on alien property does not cover loss happening during hostilities between the respective countries of assured and insurer.² This is the law to-day; it was not so formerly.³

The whole subject of contracts between alien enemies is ably discussed in the case of *Griswold v. Waddington*.⁴

The agent resident in one belligerent's territory, of a company

¹ The Hoop, 1 Robinson (Eng. Adm.) 196; The Emulous, 1 Gallison, 562, 571. *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

² *Brandon v. Curling*, 4 East, 410, *ex parte* Boussmaker, 13 Ves. Jr. 71.

³ *Furtado v. Rogers*, 3 Bos. and Pul. 191.

⁴ 16 Johns. 438, and see also DuPonceau's note to his translation of Bynkershoek on the Laws of War, p. 165.

established in the territory of another belligerent, must receive payments of premiums as they fall due, and thus keep alive the policy, though he may not remit them.¹

The tendency of international law, as expounded by the most recent authorities, is to affect private business as little as possible by war. Private interests must yield to public, but are to be interfered with only so far as the public purposes absolutely require.

It has been said recently, that it is possible to insure anything in London,² and a good many merchants and others, to whose ventures war would be disastrous, took out policies against such a contingency at Lloyd's during the late Greco-Turkish crisis. The rates paid were reported to be as follows :—In the event of war between England and France, Germany or Russia, within one year, 4 per cent. of the amount insured ; in the event of war between any of the six great powers before August 6th, 1897, 8½ per cent., and in the event of war between England and any European country, except Turkey, 5½ per cent. ; the latter rate (5½ per cent.) was also charged for a policy covering in the case of war between England and the Transvaal Republic within one year.

363. Arson.—Arson has been defined³ as the voluntary, malicious burning of a dwelling house, or outhouses within the curtilage of another person, and punishable as a felony ; while incendiarism is the act of wilfully or maliciously setting fire to buildings, or other combustible property, short of felony.

In an English case it appeared, that an insurance company granted a fire policy to one S., and during the currency of the policy S.'s wife feloniously burnt the property insured. The company, not admitting any claim on the policy, brought an action against S. and his wife for the damage done by the act of the wife. The court held, first, that the action could not be maintained, as the insurer has no other rights than those of his assured, and can enforce those only in his name and after admitting the claim on the policy ; secondly, that the action for the felony, if it were

¹ *Kersham v. Kelsey*, 100 Mass. 561. May, 42 *et seq.* *Vide supra* p. 288.

² See also *supra* § 61d.

³ *Griswold*, 59.

See also *supra* § 279 d, (per Armour, J. : the word "incendiarism" commonly applies to buildings only).

maintainable, was maintainable without showing that the felon had been prosecuted.

Semble, that a felonious burning by the wife of the assured, without his privity, is covered by the ordinary fire policy.¹

364. Plate glass insurance—Proximate cause of damage—Notice of loss to agent.—By a policy of insurance, plate glass in the plaintiff's shop front was insured against "loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair of premises," none of the glass being "horizontally placed or moveable." A fire broke out on premises adjoining those of the plaintiff and slightly damaged the rear of the shop, but did not approach that part where the plate glass was. Whilst the plaintiff, assisted by neighbors, was removing his stock and furniture to a place of safety, a mob attracted by the fire, tore down the shop shutters and broke the windows for the purpose of plunder:—It was held, that the proximate cause of the damage was the lawless act of the mob, and that it did not originate from "fire or breakage during removal," within the exception in the policy.

The policy which had been effected through L., the local agent of the defendants, was subject amongst others, to a condition, that, "in case of loss or damage, an immediate notice must be given to the manager, or to some known agent of the company." After the making of the policy, and before the loss, the defendants had transferred this branch of their business to another company. The plaintiff, not being aware of this transfer, gave notice of the

¹ *Midland Ins. Co. v. Smith and wife*, 6 Q.B.D. 561.

For recent American decisions in connection with the question of arson see: *Names v. Dwg.-House Ins. Co. of Boston*, 64 N.W. Rep. (1895), 628, as to forfeiture of insurance money both for building and property therein in case of conspiracy to commit arson, also as to occupancy with the intention to burn the property, and claim for the destruction of goods where there are no remnants.—*Knoxville F. Ins. Co. et al. v. Avery et al.*, 32 S.W. Rep. 256 (1895), where evidence of arson was held admissible under general issue, (the ruling would be different in Quebec).—*Northern Ass. Co. v. Samuels et al.*, 33 S.W. Rep. 239 (1896), the fact that assured transferred policy after suit is not competent evidence to show arson.—*Weir v. Aetna Ins. Co.*, 36 N.Y. Suppl. (1896), 216; 70 N.Y. St. Rep. (1896), 790, error to refuse instruction, that company is bound to prove arson by preponderance of testimony and not to prove it beyond a reasonable doubt.—*Feibelman v. Manch. F. Ins. Co.*, 19 So. Rep. 540 (1896), arson committed by agent of insured will not avoid policy.—*Longoor v. Merchants' Ins. Co.*, 19 N.J.L.J. 152 (1896), past attempt of arson is not increase of hazard.—*McDowell v. Conn. F. Ins. Co.*, 41 N.E. Rep. (1893), 669, the fact of many previous fires, in which assured or his relatives were concerned, is not admissible in support of plea of arson.

damage to L. who made his report thereon to the latter company :—

It was decided, that the notice to L. was a sufficient notice within the above condition.¹

365. Liability in accident insurance.—Accident insurance has, no less than other kinds of insurance, been the subject of a considerable amount of litigation. Whether the assured exercised the necessary precaution to be expected from an ordinarily prudent person, or whether he overstepped those limits and voluntarily or recklessly exposed himself to unnecessary danger, (a risk the covering of which the company never contracted for); or whether an injury or death has been in fact the result of an accident within the meaning of the policy; these and other questions have required the intervention of the courts for their adjustment, as will be seen from the cases reported or referred to hereunder.

Upon the question of voluntary exposure to unnecessary danger, an action was brought to recover upon a policy of insurance effected by the company respondents upon the life of plaintiff's deceased husband, J. N., who met his death during the currency of the policy, from being run over by a train of cars upon one of the lines of the Northern Railway through the company's yard at Toronto. In answer to the plaintiff's claim, the respondents, amongst other defences, by their fourth plea invoked a condition to which the policy sued on was subject, to wit: "No claim shall be made under this policy when the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure."

The uncontradicted evidence was, that the deceased was killed by the train coming against the vehicle in which he was driving alone, on a dark night, in what was called a network of railway tracks in the company's station yard at Toronto, at a place where there was no roadway for carriages.

The Supreme Court of Canada, affirming the judgment of the court below, (7 Ont. App. R. 570), was of the opinion, that the undisputed facts established by the plaintiff showed, that the deceased came to his death in consequence of voluntary exposure to unnecessary danger, and that, therefore, respondents were entitled to a non-suit.²

¹ Marsden v. City and County Ass. Co., 1 C.P. 232. See also *supra* §§ 29, 29a and 29b.

² Supreme Court of Canada, Neill v. Travelers Ins. Co., 12 S.C.R. 55.

There was a somewhat similiar case in England, where it appeared, that the assured met his death through attempting in broad daylight to cross the main line of a railway in front of an approaching train, by which he was run over and killed. There was no evidence that he was short-sighted or deaf. At the place where the accident happened, there was no station or proper crossing, and there was no obstruction to prevent a person about to cross from seeing an approaching train. There was no ground for imputing negligence to the servants of the railway company, and the court therefore decided that, the risk incurred by the insured being one which either was obvious to him or would have been obvious to him if he had been paying reasonable attention to what he was doing, the case came within the exception in the policy.¹

In another, Canadian, case the evidence showed, that one M., who was described in the application for insurance as superintendent of the Intercolonial Railway, was insured by the company appellant against accident, and by one of the conditions of the policy it was stipulated as follows:—"The insured must at all times observe due diligence for personal safety and protection and in no case will this insurance be held to cover either death or injuries occurring from voluntary exposure to unnecessary or obvious danger of any kind, nor death or disablement.....from getting or attempting to get on or off any railway train, etc., while the same is in motion."

M., when travelling on the business of his railway, was killed while getting on a train in motion, and the court held, that, inasmuch as M. was insured as superintendent of a railway, and there was evidence that his duties required him to get on and off trains in motion, of which facts the insurer had knowledge, the condition did not apply and the company was liable.²

A plea of voluntary exposure formed part of the defence in an action which was brought to recover the amount of an accident

¹ *Cornish v. Accident Ins. Co.*, 23 Q.B.D. 453.

² *Q.B. Accident Ins. Co. of North Am. & McFee*, M.L.R. 7 Q.B. 255.

See also *Smith v. Preferred Mut. Acc. Ass'n*, 62 N.W. Rep. (1895), 990, jumping from a moving train.—*Follis v. U. S. Mut. Acc. Ass'n*, 62 N.W. Rep. (1895), 807, walking across a railroad trestle.—*Travelers Ins. Co. v. Snowden*, 63 N.W. Rep. (1895), 392, entering or leaving a moving train.—*Fid. and Cas. Co. v. Chambers et al.*, 43 Cent. Law J. 280 (1896), sitting on railroad track.—*Lehman v. Gr. Eastern Cas. and Indemn. Co.*, 39 N.Y. Suppl. 912 (1896), stepping onto railroad track.

insurance policy in a case, where the assured was frozen to death. The particulars as submitted to the court were these :—The defendants entered into a contract with the plaintiffs to pay \$1,000 within 90 days after sufficient proof that the assured, one of their members, “shall have sustained bodily injuries effected through external, violent and accidental means, and that such injuries alone shall have caused death within 90 days from the happening thereof ;” and the policy contained these further provisions : “that the insurance shall not extend to death or disability caused by an injury of which there shall be no external and visible signs * * * nor to any case except when some injury effected as aforesaid is the proximate and sole cause of the disability or death ; and no claim shall be made under this policy when death or disablement may have been caused in consequence of exposure to any obvious or unnecessary danger.”

The assured was frozen to death on the prairie near Fort Macleod, to which place he was returning from one of his trips in company with the driver. While still about eight miles out, the waggon broke down. The weather had turned suddenly very cold and stormy, and the assured being too cold and numb to walk, and unable to ride, it was agreed that he should remain where he was, while the driver rode to Macleod for assistance, but he died before the driver returned. The assured was sufficiently warmly clothed for the weather as it was when he set out, but not for the storm which he encountered.

The court held, that he met his death as the result of an injury effected through external, violent and accidental means within the meaning of the policy, and that it could not be said that he had exposed himself to any obvious or unnecessary danger, and that the plaintiffs were entitled to recover.

Sinclair v. Maritime Passenger Assurance Company, 7 Jur. N. S., 367, was distinguished.¹

¹ *Northwest Comm. Trav. Ass. v. The London Guar. and Acc. Co.* (1895), 10 Manitoba Rep. 537.

See also: *De Loy v. Trav. Ins. Co.*, 32 Atl. Rep. (1895), 1108, where it was said, that by “voluntary exposure to unnecessary danger” is meant “intentional exposure,” as where one acts so recklessly and carelessly as to show an utter disregard to a known danger, or does an act in the face of a risk of danger so obvious that a prudent man, exercising reasonable foresight, would not have done it.—*Hess v. Van Auken, Guar. and Acc. Lloyds*, 32 N. Y. Suppl. (1895), 126; 65 N. Y. St. Rep. (1895), 119, as to accident in consequence of entering a saw mill.—*Keefe v. Nat. Acc. Soc.*, 38 N. Y. Suppl. 854 (1890), 4 App. Div. 392, alleged over-exertion while riding in

In the recent English case of *Pugh v. London B. and S. C. Ry. Co.*¹ the court declared, that a signal man in the employ of a railway company, who was incapacitated from employment through a nervous shock received while endeavoring to prevent an accident to a train, was entitled to an indemnity within the meaning of the policy.

While in another recent English case, *Hamlyn v. Crown Acc. Ins. Co.*,² an injury to the knee effected when stooping to pick up something from the floor was held to have arisen from "external means" and also by "violent accidental and visible means" within the meaning of the policy.

In *Acc. Ins. Co. of N. America v. Young*,³ the evidence showed, that the amount insured was payable, *inter alia*, in case "the bodily injuries alone shall have occasioned death within ninety days, from the happening thereof, and provided that the insurance should not extend to hernia, etc., nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused, wholly or in part, by bodily infirmities or disease existing prior or subsequent to the date of this contract, or by the taking of poison, or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death."

The insured was accidentally wounded in the leg from falling from a veranda, and, within four or five days, the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued within a few weeks.

At the trial, there was conflicting evidence as to whether the erysipelas resulted solely from the wound, but the court found, on the facts, that the erysipelas followed as a direct result from the external injury. On appeal to the Supreme Court:—

It was held, per Strong, Fournier and Patterson, J.J., that the external injury was the proximate or sole cause of death within the meaning of the policy.

a bicycle race.—*Conboy v. Ry. Offs. and Employees Acc. Ass'n*, 43 N.E.R. 1017 (1896), seining in dangerous water.—*Collins v. Bankers Acc. Ins. Co. et al.*, 64 N. W. Rep. (1895), 778, fishing on a dark night.—*Carpenter et al. v. Am. Acc. Co.*, 25 Ins. L. J. 543, death resulting from being kicked by a mule known to be dangerous.

¹ (Eng. C. A.), 2 Q. B. (1896), Law Rep. (1896), 248.

² C. A. (1893), 1 Q. B. 750.

³ Supreme Court of Canada, 20 S. C. R. 280, cited *infra* § 375.

In *Smith v. Acc. Ins. Co.*,¹ (in which case *Fitton v. Acc. Death Ins. Co.*, 17 C. B. (N. S.) 122; 34 L. J. (C. P.) 28, was discussed), the policy contained the following conditions:—
“This policy insures against all forms of cuts, etc., when accidentally occurring from material and external causes operating upon the person of the insured where such accidental injury is the direct and sole cause of the death of the insured, but it does not insure against death arising from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before or at the time of or following such accidental injury (whether causing such death directly or jointly with such accidental injury.)”

The assured accidentally cut his foot, erysipelas supervened and he died of that disease. The erysipelas was caused by the wound, and but for the wound he would not have suffered from it. The court was of opinion, that the insurance company was protected by the clause quoted above and was, therefore, not liable.

Another case,² but with a different result, of death from disease as the effect of injury caused by accident, and decided by the umpire in an arbitration authorised under the English Common Law Procedure Act, 1854,³ turned upon the question whether the company was liable for the sum payable upon death by accident, or whether the tender of the amount for disability by the company was sufficient under the policy. The evidence showed, that the assured dislocated his shoulder; he was put to bed, but, suffering great pain and being restless and unable to bear heavy or warm clothing on him, he contracted a cold, pneumonia supervened, and he died.

The court held the company liable for the death. Huddleston, B., (Willis, J., concurring) construed the words in the policy, “if the assured shall sustain any injury caused by accident and shall die from the effects of such injury,” with this conclusion:—
“These words appear to me to mean, that the injury must be immediately caused by the accident, but that the death need not be immediately caused by the injury. Now, I think that the facts stated by the umpire do show that in this case the injury was not the proximate cause of the death of the assured, yet his death did ensue from the natural consequences of the injury.”

¹ 5 Ex. 302. ² *Isitt v. Ry. Pass. Ass. Co.* (1869), L. R. 22 Q. B. D. 504.

³ 17 and 18 Vic., c. 125, s. 5.

Again he said, after reciting the facts: "These facts appear to me to constitute a chain of circumstances leading naturally from the injury to the death." All these circumstances the court treated as "effects of the injury."

Where a policy of insurance against death from accidental injury contained the following condition:—"This policy insures payment only in case of injuries accidentally occurring from material and external causes operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, but it does not insure in case of death arising from fits * * * or any disease whatsoever arising before or at the time, or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury;" and the insured, while at a railway station, was seized with a fit, fell forward off the platform across the railway and was killed by an engine and carriages just passing, the court, notwithstanding the explicit wording of the above clause, was of opinion, that the death of the insured was caused by an accident within the meaning of the policy, and that the insurers were liable.¹

So also in *Winspear v. Accident Ins. Co.*,² the proviso in the policy excluding "any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease" was declared not to apply to a case where the assured, while crossing and fording a stream, was seized with an epileptic fit and was drowned. The court decided, that death was occasioned by an injury within the risk covered by the policy.

¹ *Lawrence v. Accident Ins. Co.*, 7 Q.B.D. 216. ² 6 Q.B.D. 42.

Vide Prader v. Nat. Masonic Acc. Ass'n, 63 N. W. Rep. (1895), 601, for sufficiency of evidence as to proximate cause of death.—See also *Travelers Ins. Co. v. Melick*, 65 Fed. Rep. (1895), 178; 24 Ins. Law Journal (1895), 430.

As to construction of external, violent and accidental means, see also *Cobb v. Preferred Mut. Acc. Ass'n of N. Y. et al.*; *Pref. Mut. Acc. Ass'n of N. Y. et al. v. Cobb*, 25 Ins. L. J. (1896), 59, paralysis of optic nerve owing to overexertion when in a feeble condition.—*Meyer v. Fid. and Cas. Co.*, 65 N.W. Rep. 328 (1896), injuries from fall due to unexpected physical disorder.

Healey v. Mut. Acc. Ass'ce Co. (1890), 133 Ill. 556; *Travelers Ins. Co. v. Dunlap*, 25 Ins. L. J. (1896), 604, death from taking poison by mistake.—*Bailey v. Inter-State Cas. Co. of N. Y.*, 40 N. Y. Suppl. (1896), 513, blood poisoning from hypodermic injection.—*Fid. and Cas. Co. v. Waterman*, 59 Ill. App. 297; *Mennelly v. Empl. Liab. Ass. Co.*, 148 N. Y. 596, (1896), death from inhaling gas.

The press have recently noticed a case before the Court of Appeals of Kentucky, but not yet reported, where it was decided, that death caused by blood poisoning resulting from a mosquito bite is to be classed among accidental deaths.

The effect of taking or inhaling poisonous or diseased substances has been fully

It will readily be seen, that it is often difficult to say whether death by violent means has been the result of purely accidental injury or was caused by an intentional act of the assured, in which latter case the company would be relieved from all liability, as accident insurance policies generally contain a stipulation excluding cases of suicide.¹

The legal presumption in accident insurance, as pointed out in *Cronkhite v. Travelers Ins. Co.*,² is, that injuries are accidental unless and until it is proved that they have been intentionally inflicted or caused by the negligence of the assured.

The following is a leading Canadian case which came before the Court of Common Pleas of Upper Canada. The insured, whose policy covered death by accident, was found dead in a cattle guard on a railway, having been run over by a passing train. The cattle guard was at the side of a street and near the end of the railway station platform, which extended to and adjoined the street. There was no express evidence as to how the deceased got into the cattle guard. The insurers set up that, contrary to the terms of the policies, the death was occasioned by suicide or exposure to obvious and unnecessary danger, by the insured attempting to cross over the street by walking on the track and then falling into the cattle guard. The case was well considered upon leading cases as authorities.

discussed in an article in 28 Chicago Leg. News (1896), 314, entitled "The scope of accident insurance," in which the writer concludes that, without a special exception in the policy, avoiding liability in such cases, the company should be held liable.

For construction of "occupation" see *Union Mut. Acc. Ass'n v. Frohard*, (1890), 134 Ill. 228, where a person insured as "merchant" was accidentally killed while hunting.—*Metrop. Acc. Ass'n v. Hilton*, 61 Ill. App. 100, livery stable owner injured while driving a cab.—*Standard L. and A. Ins. Co. v. Taylor*, 34 S.W. Rep. 781 (1896), railroad blacksmith injured coupling cars.

Fidelity and Casualty Co. v. Johnson, 17 So. Rep. (1895), 2, where death by hanging at the hands of a mob was held an accident within the meaning of the policy.—*Robinson v. U. S. Mut. Acc. Ass'n*, 68 Fed. Rep. (1895), 625, where the assured, being unarmed at the time, was shot while engaged in an altercation, and death was held to be accidental.—But see *American Acc. Co. v. Carson*, 24 Ins. L. J. 738 (1895) and 25 ib. 786, (1896), as to recovery where death was caused by the assured being shot by a prisoner whom he was attempting to arrest, the policy excluding "intentional injuries inflicted by the insured or any other person."—*Jones v. U. S. Mut. Acc. Ass'n*, 61 N. W. Rep. (1895), 485, death in consequence of alleged violation of law.

For death resulting from a personal rencounter not being included in an accident insurance policy, see *Gresham v. Equitable Acc. Ins. Co.* (1891), 87 Ga. 497.

¹ See *infra* chap. XX.

² (1889), 75 Wis. 116; 19 Ins. L. J. 267.—See also *Ingersoll v. Knights of Golden Rule*, U. S. C. C., 21 Ins. L. J. (1891), 276; and for the same rule applied to life insurance, when death is caused by violent means, see the very recent case of *Crozler v. Home L. Ins. Co.*, 20 L. N. 168, *infra* § 383.

Inter alia the court held, that the proof of such defence rests with the insurers setting it up, and the evidence of it should be clear and convincing.

The case came up on a rule for a new trial, the jury having found a verdict against the insurers, which rule the court discharged. Upon the evidence, it was held, that there was none of any such exposure, for that it was equally consistent with the evidence that the deceased accidentally fell into the cattle guard from the platform while walking along the platform; and, at all events, that the using of a track to cross a street was not the mode of walking thereon against which prohibitions in these policies are levelled. As to the clause in the policy, that "the insurance shall not be held to extend to mysterious disappearance, nor to any case of death or disability the nature, cause or manner of which is unknown, or incapable of direct and positive proof," Hagarty, C. J., said:—"We think it would be a perversion of the true meaning of this clause to hold that, where the immediate cause of death is indisputable, and evidenced by outward violence caused by a train running over the body, an accident *prima facie* within the direct meaning of the insurance, it can be any objection that no human eye witnessed the precise manner in which the deceased met his fate."

"A large proportion of accidental deaths occur under such circumstances that evidence is wanting as to the precise manner in which the deceased met his fate. Where the visible injuries plainly account for death, it can hardly be necessary to explain step by step how it occurred."¹

The question of accidental death or suicide was also fully discussed in a recent Scottish case,² where the policy required satisfactory evidence if the claim was made on the ground of death from accident. The assured was found drowned in the Clyde and the company, alleging suicide, refused payment in the absence of sufficient proof to the contrary.

The Court of Sessions, recalling the judgment of the Sheriff's Court, gave a decision in favor of the pursuer ordaining the company to pay. Lord Justice Clerk said:—

"The only fact apparent here is that the deceased, after he left his house, was found drowned in the Clyde. There is nothing

¹ Wright v. Sun Mut. Life Ins. Co. (1878), U. C. O. P. 221.

² Boydor MacDonald v. Refuge Assur. Co. (1890), 17 Sess. Cas. 955 (Sc.)

in his previous history, or what was known of him up to the date of his death, to suggest that he was likely to commit suicide, or that if he was found drowned it would be the result of anything else than an accident. Now, the evidence which the pursuer brings forward is, that the deceased was a reputable man, so careful of the interests of others, indeed, that he insured his life, and a man in no way likely to commit suicide, and that he disappeared and was subsequently found drowned in the Clyde. That, on the face of it, points to accident and to nothing else, and it is reasonable to say that in such a case the presumption is in favor of accident. There might be many cases in which, where the insurance is against death by accident, nothing at all could be recovered, if it was essential that the pursuer must prove conclusively that the cause of death was accident, not suicide. In my opinion, if the pursuer brings forward evidence of the death having happened in such a manner as naturally points to accident, she fulfils all that is incumbent on her, and I hold that she has done so here. To call upon the pursuer to disprove negatively other causes of death, would be to put upon her a burden which is not according to a fair reading of the contract.”¹

¹ See also *De Van v. Com. Trav. Mut. Acc. Ass'n of America*, 36 N. Y. Suppl. 931; 92 Hun. 256 (1896), for a case of accidental drowning or suicide.—*Meadows v. Pac. Mut. L. Ins. Co.*, 24 Ins. L. J. (1895), 721; *Standard L. and A. Ins. Co. v. Langsdon*, 30 S. W. Rep. (1895), 427, for presumption as to cause of death, burden of proof and definition of “roadbed.”

In *Whitlatch v. Fid. & Cas. Co.*, 25 Ins. L. J. (1896), 586, and *National Mas. Acc. Ass'n of Des Moines v. Shryock*, 73 Fed. Rep. 774 (1896), it was held, that the burden was on plaintiff to prove, that the assured died from external, violent and accidental means, and that the accident was the sole cause of death.

But in *Williams v. U. S. Mut. Acc. Ass'n*, 31 N. Y. Suppl. (1895), 343; 63 N. Y. St. Rep. (1895), 793, the court said, that the plaintiff is not obliged to prove that the assured did not commit suicide or did not voluntarily expose himself to unnecessary danger.

In *McGlinchy v. Fid. & Cas. Ins. Co.*, 18 Ins. L. J. 128, the dead body was declared to be sufficient evidence; but it is now generally stipulated in the policy, that it shall not be so.

A case, in which the question of proof was fully discussed, was that of *Utter v. Trav. Ins. Co.* (1887), 65 Mich. 545, s. c., 32 N. W. Rep. 812, where the insurer attempted to have the benefit accorded to it of the clause in its policy requiring direct and positive proof, that the death or injury insured against was caused by external violence and accidental means, and was not the result of design, either on the part of the insured or any other person. The Supreme Court of Michigan were very decided in their opinion upon the matter, spoken through Morse, J., as follows:—“Courts will not permit the course of justice, upon trials before them, to be stipulated or counteracted in such manner as to defeat the ends to be subserved by such trials. The parties to the contract cannot agree to oust the courts of jurisdiction over such contract. The operation of this clause, requiring direct and positive

Upon the question of total disability from old age, an action was taken in Ontario under the following circumstances:—The plaintiff, who was a farmer, had his life insured by the defendants, and there was a clause in the policy, or certificate of insurance, providing that in case of "total disability" of the insured the insurers would pay him one half the amount of the insurance. About two years after effecting the insurance, the plaintiff conveyed his farm to his son, reserving to himself and wife certain benefits, but continued to work upon the farm for about a year thereafter, when he was attacked by bronchitis and asthma.

In an action to recover one half the amount of the insurance, the evidence showed, that the plaintiff was totally disabled, permanently and for life, from doing manual labor, and that the diseases from which he suffered, were the proximate and immediate cause of his disability. A medical witness said, that he considered the plaintiff's condition attributable to a considerable extent to his advanced years, he being about seventy. The court therefore decided, that total disability to work for a living was what was intended to be insured against, and disability from old age was not excluded, and the evidence showed that the plaintiff came within the terms of the certificate. The arrangement made by the plaintiff with his son, after the certificate was issued, could have no effect upon the prior contract of insurance.¹

proof, in many cases would in effect preclude the court from jurisdiction, and bar a recovery. If they can make this agreement, they can also stipulate that the evidence must come from certain persons, or make any agreement they see fit, controlling and directing the course of proceeding upon the trial. They may contract in relation to a condition precedent before bringing suit, or in relation to anything going to the remedy, but not to the right of recovery itself. Circumstantial evidence is regarded by the law as competent to prove any given fact, and sometimes it is as cogent and irresistible as direct and positive testimony. . . . When a stipulation or exception to a policy of insurance, emanating from the insurers, is capable of two meanings, the one is to be adopted which is the most favorable to the insured." (Rule *contra proferentem*).

¹ *Dodds v. Can. Mut. Aid Ass'n*, 19 O.R. 70. Q.B.D.

"Immediate" disability has been construed in *Merrill v. Trav. Ins. Co.*, 25 *Ins. L. J.* (1896), 143. *Prof. Mas. Mut. Acc. Ass'n v. Jones*, 60 *Ill. App.*, 106.

Total blindness, resulting from accident, was held in *Moge v. Société de Bien-faisance* (Mass.), 35 *L. R. A.* 736, to be within the provisions of a policy providing for weekly benefits when one is "incapable of working" by reason of accident.

Where a policy for a stated sum provides that, if the assessment levied to pay it is insufficient, the beneficiary shall receive only such proportion as may be applicable to its payment, the burden of proving that the assessment was not sufficient is on the company. This was the decision rendered in *People's Mut. Ben. Soc. v. McKay*, 39 *N. E. Rep.* (1895), 231; re-hearing denied, 40 *N. E. Rep.* (1895), 910.

In an English case, where an infant entered the service of a railway company and agreed to become a member of an insurance society and to be bound by its rules, the railway company had contributed to the funds of the society. The rules provided compensation for other accidents than those covered by the "Employers' Liability Act," 1880, but restricted compensation to less than the amount which could be recovered under that Act, which contained provisions forfeiting benefits in default of notice of an accident, in case of various breaches of the regulations, and referring disputes to arbitration :—

It was held, that the agreement to become a member of the society and to be bound by its rules, was part of a contract of service into which an infant was competent to enter, and it was also held, that the contract was an answer to an action against the railway company by the infant under the Act, for the restrictive covenants were such as an insurance society might reasonably make for the protection of its funds; and the contract taken as a whole was for the benefit of the infant and binding on him.¹

The terms "any one accident" and "from (such a date)" were construed in the case of *South Staffordshire Tramways Co. v. Sickness and Acc. Ass'ce Ass'n*,² where a policy insured against

¹ *Clements v. London and North Western Railway, C.A.*, affirm. Div. Ct. (1894) 2 Q.B. 482.

For recent American decisions regarding employers' liability, see *Hawkins v. McCalla et al.*, 22 S.E. Rep. (1895), 141, where it was decided that the fact of an accident insurance company undertaking to indemnify an employer does not constitute a contract between the employees and the insurance company.—Also *Anoka Lumber Co. v. Fid. and Cas. Co.* (Nelson, intervener), 25 Ins. L. J. (1896), 241, as to notice of injury and garnishment.—Refer also to *supra* §§ 27c (note 11), 27d, 27e and index for other cases of employers' liability.

² C. A. and Div. Ct. (1891), 1 Q.B. 402.

It has been decided in *Commonwealth v. Phil. Inquirer*, 3 Pa. Dist. R., 742, that a coupon printed in a daily newspaper, offering to pay a certain sum to the heir of any one meeting death by accident, if the holder signs his name in a blank space and has a copy of the newspaper upon his person at the time of the accident, constitutes an accident insurance policy beyond the powers of the printing company to issue, and that, therefore, a corporation, organized to publish a newspaper and conduct a printing business, has no power to insure against accidents.

It appears that the practice of newspapers of trying to increase their circulation by offering their subscribers an insurance against accidents, was first introduced in England a number of years ago, but was discontinued soon afterwards upon objections being raised by the Revenue authorities on account of the stamp duty. This obstacle, however, was soon overcome by the proprietors of the newspaper, who made arrangements with a duly organized insurance company, whereby the latter undertook to insure the holder of the paper, and thus the object was attained in a legitimate way. This plan has found many imitators in Canada and other countries.

"claims for personal injury in respect of accidents caused by vehicles for twelve calendar months from November twenty-fourth, eighteen hundred and eighty-seven" to the amount of "£250, in respect of *any one accident*." A tram car was overturned, forty persons injured, and compensation to the amount of £833 claimed. The defendants said, the overturning was one accident, and refused to pay more than £250. :—The court was of opinion, that "any one accident" meant "injury in respect of which a person claimed compensation," and the defendants were liable for the £833. "From" was held to exclude November 24th, 1887, and to include November 24th, 1888, the day of the accident.

366. Liability in guarantee contracts.—Guarantee or fidelity insurance¹ is closely allied to accident and casualty insurance, and a company transacting the one generally undertakes to cover the other also. There have been numerous instances, both in Canada and other countries, where the companies have resisted the payment of claims made upon them upon different grounds, some of them differences as to the exact interpretation of the agreement between the contracting parties. Several cases belonging to this branch of insurance have found a place in other parts of this work,² and the following will be of no less interest, coming under the general heading of liability.

In the case of the *Bank of Toronto v. the European Assurance Society*, which passed through the various stages of the Canadian courts and was finally decided by the Privy Council, the Bank of Toronto obtained a policy of assurance from the European Assurance Society, insuring them against such loss as might be occasioned to the bank "by the want of integrity, honesty or fidelity, or by the negligence, defaults or irregularities" of one A.M., their manager at Montreal. M. subsequently allowed N. and R. to overdraw their account to the amount of \$47,844.00, whilst he knew they were not able to pay that sum, and whilst mixed up with them in broking transactions.

It was decided, confirming the judgment of the Queen's Bench, that the insurance company was responsible to the bank for the

¹ See *supra* § 30, and 60 Vic., c. 36 (O.), s. 2, ss. 47.

It may be noted here, that the reinsurances exchanged between fire insurance offices in London, Eng., are commonly designated as "guaranty" business. This is, of course, different from the guarantee contracts above spoken of.

² See index.

irregularity, especially as, in the opinion of the court, the manager concealed the fact of the overdrafts from the head office by fictitious returns, and acted in improper concert with the parties whom he allowed to overdraw.¹

In *Grand Trunk Railway Co. v. Citizens Insurance Co.*, the latter pleaded gross negligence on the part of the assured as entitling them to be relieved from the liability they had undertaken by the issue of a guarantee policy to the plaintiffs. The circumstances on which the claim was founded were these:—

An employee of the Grand Trunk Railway left a large sum of money in two bags in his room, the door of which was insecurely locked, while he went to lunch, without availing himself of the means of safe-keeping provided for him, and on his return from lunch, the most of the money, as the employee alleged, had disappeared.

The Court of Queen's Bench, confirming the judgment of the Superior Court, was of opinion that, although there was no suspicion or imputation of dishonesty against the employee, the insurance company was liable, as there was negligence sufficient to constitute a breach of the warranty of diligence and fidelity.²

In another Canadian case, the question of supervision over the books kept by the person assured, and of notice of an impending claim to the company, was raised. The facts as submitted to the court were these:—A guarantee policy insuring the honesty of W., an employee, was granted upon the express conditions that the answers in the application contained a true statement of the manner in which the business was conducted and accounts kept, and that they would be so kept, and that the employers should, immediately upon its becoming known to them, give notice to the guarantors that the employee had become guilty of any criminal offence entailing, or likely to entail, loss to the employers and for which a claim was liable to be made under the policy. There was a defalcation in W.'s accounts, and the evidence showed that no proper supervision had been exercised over W.'s books, and the guarantors were not notified until a week after the employers had full knowledge of the defalcation and W. had left the country.

The Supreme Court of Canada, affirming the judgment of the

¹ 14 L. C. J. 186. 7 R. L. 57, P. C., 1875.

² 25 L. C. J. 163, Q. B. 1880.

court below, decided that, as the employers had not exercised the stipulated supervision over W. and had not given immediate notice of the defalcation, they were not entitled to recover under the policy.¹

Guarantee insurance policies as a rule define the period during which they will, beyond their nominal currency, cover defalcations or other dishonest acts to be guarded against, but, as was to be expected, it has sometimes been found difficult to determine whether certain cases come within these limits or not. Insurance companies have, consequently, been called upon to reimburse employers for defaults committed by their employees either prior to, or after the expiration of the time fixed in the bond for their liability, and the courts have been appealed to to determine with whom the burden of responsibility rested.

In one Quebec case the evidence showed, that the teller of a bank endorsed on a parcel of bank notes the amount which it was supposed to contain. It was subsequently discovered, that the parcel was \$9,300 short, and it was also ascertained, that a deficiency of the same amount existed in the teller's accounts, and had been during several years skilfully covered up and concealed from the authorities of the bank who had made the usual inspections.

The court decided, that the guarantee insurance company, which had guaranteed the fidelity of the teller, was liable for the deficiency, but only to the extent which occurred after the contract was made.²

And in another Quebec case it appeared, that by a condition of the policy it was provided, that the company should make good to the employer such pecuniary loss as might be sustained by him by reason of the dishonesty of the employees "committed and

¹ Supreme Court of Canada, *Harbor Coms. of Montreal v. Guarantee Co. of N. A.*, 22 S.C.R. 542.

For an American decision on the question of supervision over books see *Mech. Sav. Bk. and Trust Co. v. Guar. Co. of N. A. et al.*, 68 Fed. Rep. (1895), 459, where it was said, that bonds of indemnity by fidelity insurance companies are analogous to ordinary policies of insurance and are governed by same principles of interpretation. It was held in this case, that a quarterly examination in good faith, such as was customary for the protection of the bank, was sufficient to satisfy the requirement of the bond, though it was somewhat loose and careless. Also, that a controversy between the bank and a former cashier about certain commissions, claimed both by the bank and the cashier, was not a default within the terms of the contract.

² *La Banque Nationale & Lesperance*, 4 L. N. 147, S. C. 1881.

discovered during the continuance of this agreement, and within three months from the death, dismissal, or retirement of the employee." The policy lapsed and a defalcation was discovered four months afterwards.

It was held, by the Superior Court, that the company was not liable in respect of such defalcation, inasmuch as it was not discovered as well as committed during the continuance of the agreement.

The policy also contained a clause, that on the discovery of any fraud or dishonesty on the part of the employee, the employer should immediately give notice to the company. A defalcation was discovered April 6th., and the company was not notified until April 17th, when the employee had left the country. It was held, by the Court of Queen's Bench, that the employer was entitled to recover under the policy.¹

Several important points touching fraud and dishonesty amounting to embezzlement, and the effect of recovery of part of the money, etc., were decided in an action brought before the Court of Queen's Bench, Quebec, a few years ago, and which was based upon the following facts :—The cashier of a bank removed bundles of notes from the bank premises to his residence for the purpose of signing them, but it appeared that he brought them all back and subsequently, in his office in the bank, he put a number of \$5 notes in the bundles, instead of \$10 notes, and thus defrauded the bank of \$8,140.

The court held :—1. In entrusting the notes to the cashier to be signed, there was no negligence on the part of the bank involving a violation of the terms of the contract, and the loss was one caused by "fraud and dishonesty amounting to embezzlement" on the part of the employee, and came under the guarantee given by the policy.

The same employee, shortly before his flight from the country, caused his own cheques to the amount of \$15,574 to be certified

¹ Q. B., Com. Mut. Bdg. Society of Montreal v. London Guarantee and Accid. Co., M.L.R. 7 Q.B. 307.

See also :—Fid. and Cas. Co. v. Consolidated Nat. Bk., 71 Fed. Rep. (1896), 116, where the bond was held not to cover a default committed more than twelve months prior to its discovery, such discovery having been prevented by falsifications on the part of the employee.—DeJernette v. Fid. and Cas. Co., 25 Ins. L.J. (1896), 315, where a renewal was held a separate contract, and the company was declared not liable for thefts committed during the currency of the bond under a previous renewal, but discovered too late to come under the renewal in force.

by the ledger-keeper of the bank, although he, the cashier, had no funds there.

It was held :—2. This act, although, technically speaking, not constituting the crime of embezzlement, was “fraud and dishonesty amounting to embezzlement” on the part of the cashier, and came under the guarantee of the policy. These words in the policy have to be taken in their ordinary or vulgar sense, as otherwise the words “fraud or dishonesty” would be without effect.

3. The fact that the bank recovered a large part of the money taken, did not affect its right to claim under the policy, there being a balance of total loss remaining which exceeded the amount of the policy.

4. The claim of the bank was not affected by its communications with the employee after his flight, such communications not having had any injurious effect as regards the guarantee company.

On the 30th May the cashier did not appear at his office, and a number of the cheques certified by the ledger-keeper, as above mentioned, were presented and paid, although he had no amount to his credit to check against. On the following day the bank gave notice of the defalcation to the local agent of the guarantee company.

It was held :—5. The notice was given *en temps utile*, and the bank was not guilty of negligence.¹

The decision in an English case turned upon the question of a clause in the policy regarding the prosecution of a dishonest employee, which clause the insurance company claimed to contain a condition precedent. From the evidence put before the court it appeared, that one F., who was about to employ one M. in a situation of trust and confidence, effected a policy with a guarantee

¹ London Guar. and Acc. Co. v. Hochelaga Bank (1893), 3 R.J.Q., Q.B. 230.

The American Surety Co. v. Pauly, 72 Fed. Rep. (1896), 470, was a case where a bank was insured against fraud, etc., of its cashier; the bank suspended payment, and the cashier continued in the service of the receiver, who afterwards notified the company of the discovery of dishonest acts. Evidence of fraudulent acts occurring before the date of the bond, and for which no claim was made, was held admissible to show that the acts, on which the claim was based, were intentional and not merely negligent or due to oversight. Prior to the issue of the bond, the president and cashier had conspired to rob the bank, but, nevertheless, a certificate of the cashier's good character was made by the president, without authority from or knowledge of the board of directors :—It was held, that the president's knowledge of the cashier's dishonesty was not to be imputed to the bank, so as to make it responsible for the misrepresentations contained in the certificate.

company to secure himself against fraud by embezzlement of money by M. The policy, which was for £1000, declared, that "subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this policy" the company undertook to reimburse any pecuniary loss sustained by the employer from "the fraud or dishonesty of the employed as should amount to embezzlement of money as should be discovered within three months of the death, dismissal, or retirement of the employed." The employer was to give a notice of the claim, and proofs were to be given such as the directors for the time being might require. Then followed this proviso "provided that the employer shall, if and when required by the company, (but at the expense of the company if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) in consequence of which a claim shall have been made under this policy and shall at the company's expense give all information and assistance to enable the company to sue for and obtain reimbursement by the employed or by his estate or of any moneys which the company shall have become liable to pay." F. claimed under this policy a sum of money alleged to have been lost by M.'s embezzlement. The directors pleaded, that they had required F. to prosecute M., but that F. had not done so. Demurrer, because it did not appear that there was any obligation upon F. to prosecute M. or that the non-performance of any such obligation was a condition precedent to F.'s right to recover.

It was held, reversing the judgment of the court below, (Lord Selbourne, L.C., diss.) that the proviso did constitute a condition precedent and furnished a defence to the action.¹

Guarantee insurance business has lately been extended to protect debenture-holders against losses they might suffer from their debtor's default to make payment in due time. This branch of guarantee insurance being comparatively new, the details of its working have not yet been fully established, but the recent English case of *Finlay v. Mexican Investment Corporation*² indicates some of the problems which the courts will have to solve. The debentures in that case were to mature on November 4, 1895, and the policy which the debenture-holder effected, guaranteed payment

¹ London Guar. Co. v. Fearnley, 5 App. Cas. 911.

² Referred to in 20 L. N. 187.—See also *supra* § 353, as to subrogation.

of the principal moneys, if default was made by the debtors for more than three calendar months after date. The policy also provided by one of the conditions, that the assured was not, without the consent of the guarantor corporation, to assent to any arrangement modifying the rights or remedies of the assured under the debentures. Later on, the company found itself in difficulties and had the trustees for the debenture-holders call a meeting, whereat the debenture-holders, by special resolution, voted to postpone the period for payment for three years. The insured debenture-holder was no party to this proceeding, and he sued the guarantor corporation on the policy. The latter could not, of course, say that the debenture-holder had broken the condition by assenting to a modification of the contract, because he had done nothing, and the position they took up, ingeniously enough, was that there had been no default. The court was of opinion that, as between the debenture-holder and the guarantor corporation, the debtors had clearly made default within the terms of the policy, because they considered, that it was just such contingencies as these, that a guarantee policy was taken out to meet—to insure the debenture-holder getting his money at the stipulated date. The insurers could not complain; they got their premiums and the salvage—that is, they were surrogated to all the rights of the debenture-holder, and they must take the burden with the benefit.

Where by a document, headed “policy of insurance,” the defendants guaranteed to the plaintiffs, the “assured,” payment of a deposit with a bank in a colony, if the bank should make default in payment, the bank made default, and subsequently a scheme of arrangement was sanctioned by a meeting of creditors and the colonial court. Under a colonial statute the scheme was binding on the plaintiff who, however, did not assent to the scheme.

It was held, by C. A. (affirm. Div. Ct.), that the defendants were liable on their contract, notwithstanding the scheme of arrangement.

Per Lord Esher, M.R., and Lopes, L. J., that the contract was one of insurance against the default of the bank to pay. Therefore, the defendants were liable to pay, but were entitled to be subrogated to the rights of the plaintiffs under the scheme of arrangement.

Per Kay, L. J., whether the contract was one of insurance or one of suretyship, the scheme of arrangement operated to discharge the bank under the statute and not by way of accord and satisfaction, and did not defeat the right vested in the plaintiffs under the contract upon default made by the bank.¹

And in *Laird v. Securities Ins. Co.*,² the plaintiff having lent money on deposit-receipt to an Australian bank, insured the deposit with defendants, who guaranteed payment of the deposit with interest, in case re-payment was not made within a certain time; the policy contained a condition providing for subrogation. Before the deposit fell due, the bank suspended payment, and a compromise was made transferring the liabilities to a new company. The court decided, that the bank made default, and that the plaintiff satisfied the condition of the policy by offering to transfer the deposit.

¹ *Dane v. Mortgage Ins. Corp'n*, C.A. (1894), 1 Q.B. 54. See also *supra* § 353, as to subrogation.

² 32 Scott. Law Report (1895), 319. See also *supra* § 353, as to subrogation.

CHAPTER XVII.

PROOFS OF LOSS.

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| 367. GENERAL REMARKS. | 373. NOTICE AND PROOFS BY THIRD PARTIES INTERESTED. |
| 368. NOTICE OF LOSS. | 374. TIME FOR PAYMENT OF LOSS. |
| 369. PROOFS OF LOSS. | 375. WAIVER OF PROOFS OF LOSS. |
| 370. SUFFICIENCY AND INSUFFICIENCY OF PROOFS. | 376. MISTAKES IN PROOFS—WAIVER OF DEFECTS AND OF INSUFFICIENCY. |
| 371. NON-DELIVERY OF PROOFS. | |
| 372. MAGISTRATE'S CERTIFICATE. | |

367. General remarks.—In the preceding chapters of this work we have endeavored to trace the contract of insurance from its inception. We have considered the various legislative enactments in the light of the judicial decisions interpreting them, and we have followed the subject from its earliest stage, an oral agreement to insure, through the various incidents of the completed contract, up to the time when the liability of the insurance corporation to make compensation is either established or declared forfeited. We have now to consider what steps are necessary for the assured to take in order to obtain the pecuniary benefit which he originally had in view, when he sought to protect himself, in the case of certain emergencies, by taking out a policy of insurance.

The first duty incumbent upon the assured or the beneficiary, as the case may be, is, of course, to give notice to the insurer that a claim is to be made, and then to furnish such proofs as will be necessary to substantiate the claim and enable the parties to arrive at the amount to be paid. In order to avoid any risk of forfeiture, the claimant must fulfil these obligations within a certain time and observe certain formalities, as laid down in the written agreement or prescribed by legislation, unless he be, under certain circumstances, exempt therefrom. It is but natural that this part of the insurance contract has, no less than the preceding stages, furnished ample food for litigation. The assured, apart from cases of attempted fraud, has in many instances, owing to ignorance or carelessness, failed to conform to the rules, while in other cases he

has been, without any fault on his part, placed in such a position as to be unable to comply with all the conditions required ; and such non-compliance has frequently given a company legal ground for resisting payment where they could not otherwise have done so, although perhaps in all fairness entitled to avail themselves of a breach of the contract by the assured.

368. Notice of loss.—The law in Quebec is, that notice must be given within reasonable time, or as stipulated in the policy, unless such stipulation be waived, or unless it is impossible for the assured to give notice or make the preliminary proofs within the delay specified, in which case he may take reasonable time.¹

In Ontario, Manitoba and British Columbia, where, by reason of necessity, accident or mistake, the condition as to proof has not been strictly complied with, or where, after a statement of proof of loss has been given in good faith, the company objects to the loss on other grounds than for imperfect compliance with the condition, or does not within a reasonable time object, giving particulars of the defects, they will not be allowed to plead the non-compliance as a discharge of their liability ; and the court has the power to declare such a forfeiture inequitable, in any case, and may refuse to allow it.²

It would appear that this provision is intended to apply to both the time of delivery and the insufficiency of the proofs of loss.³

In the United States it is held, that a failure to give notice within the time required, stands upon a different ground from a failure to give the notice in due form. The latter defect may be remedied by a new and more accurate form, but the former, if insisted upon by the insurer, is irremediable. It may, indeed, be waived, but it would seem reasonable to require a different kind of evidence from that which ought to be satisfactory in cases of a mere defect in form. The silence of the insurers upon a mere defect of form might be very injurious to the insured, since, if the defect were pointed out to him, he might at once supply the

¹ C.C.L.C. 2478. *Scott v. Phoenix Ass. Co.*, St. Rep. 152, 355 ; *Dill v. Quebec Ass. Co.*, 1 Rev. 113 ; *Black v. National Ins. Co.*, 24 L.C.J. 76 Q.B. *infra*. May 465. See *Guerin v. Manchester Fire Ins. Co. infra*, and *Dupuis v. North Brit. & Merc. Ins. Co.*, Superior Court, Montreal, 6th May, 1897, not yet reported.

² 60 Vic., c. 36 (O), s. 172.—R.S.M. 189, c. 59, s. 2.—B. C. Ins. Policy Act 1893, c. 12, s. 2.

³ *Robins v. Victoria Ins. Co.*, 3 A.R. 427 (1881), *infra*.

deficiency and save himself from loss.¹ It will thus be seen, that United States precedents on questions of notice of loss are hardly in all instances applicable to Canadian cases.²

The provision in a policy that no agent has power to waive any of its conditions, has been held in Missouri not to refer to a stipulation, printed on the back of the policy, requiring prompt notice of loss, such a provision only affecting matters prior to the loss.³ The Iowa Supreme Court has held, that to establish a waiver of the conditions of a policy, as to notice and statement of loss, by the acts of the company's soliciting agent or adjuster, his authority to make a waiver must be proved.⁴

The Civil Code of Lower Canada assimilates notice of loss to proofs of loss, and it would seem that they should be assimilated under the Ontario, Manitoba & British Columbia enactments also.⁵

Where a policy requires notice of loss to be given "forthwith" by the insured to the insurer⁶ and is silent as to the mode of service, the insurer will be presumed to have received the notice, if it be proved to have been properly addressed and posted, since the post is the natural and obvious mode of communication in matters

¹ May, 464; and see *Whyte v. Western Ins. Co.*, 22 L.C.J. 215, in Privy Council, *infra*.

² The following decisions of United States courts, as regards notice of loss, may prove of interest:—

In *Coffman v. Niagara F. Ins. Co.*, 57 Mo. App., 647, it was said, that written notice of loss, required in a policy of insurance, is waived where verbal notice is given the local agent, who communicates it to the company, which acts upon it without complaint.—And in *Union Ins. Co. of Calif. v. Barwick* (1893), 54 N. W. Rep. 510, the condition as to immediate notice after the fire was held complied with by an inspection of the goods on the part of an adjuster. See *infra* § 375, note.

Giving notice and furnishing proofs of loss, etc., is a condition precedent, and satisfactory proof of compliance with that provision a pre-requisite to a right of recovery, unless waived; and where, as in *Central City Ins. Co. v. Oates* (1889), 86 Ala. 558, the policy required notice to be given in the city of the principal place of business of the company, the deposit of a notice by the assured in the post office of the place of loss, and which was never received by the insurer, is not a compliance with the condition.

"Forthwith" in clauses on notice of loss means "without unnecessary delay, or with reasonable diligence, under the circumstances of the particular case"; *Beach* 1201.—In *Trask v. Ins. Co.*, 75 Pa. St. 198, and *Edwards v. Ins. Co.*, 75 Pa. St. 378, where the policy required the notice to be given "forthwith," it was held, that unexcused delays of eleven and eighteen days respectively were unreasonable, and should be so pronounced as matter of law.—See also *Carpenter v. German-Amer. Ins. Co.* (1892), 135 N. Y. 298, referred to *infra* § 376, note.

³ *Loeb v. Am. Central Ins. Co.* (1889), 99 Mo. 50.

⁴ *Barre v. Council Bluffs Ins. Co.* (1889), 76 Iowa 600.

⁵ *Robins v. Victoria Ins. Co.*, 6 A.R. 427, *supra*, and referred to *infra* § 371.

⁶ 60 Vic., c. 36 (O), s. 168, ss. 13 (a).

of business, especially when insured and insurer reside in different places; and the same rule applies to proofs.¹

And in a case of guarantee insurance, where the condition of a guarantee bond required the employer to give notice immediately to the guarantor of any criminal offence of the employee, entailing loss for which a claim was liable to be made under the bond, and the employer, although aware of a defalcation on the 25th, did not give notice to the guarantor until the 27th, after the employee had fled from the country, the bond was held to be forfeited.²

Similarly, it has been decided that an employer, who holds a guarantee from an insurance company on his employee, is bound to inform the company of irregularity in the employee's account, as stipulated in the policy.³

A delay of twenty days before giving notice of a loss by fire is too long, where it is required to be given "forthwith."⁴

But notice of loss and particulars of it may be waived by the insurer expressly or by conduct in dealing with the assured.⁵

369. Proofs of loss.—Proofs of loss must be made by the assured, although the loss be payable to a third party, but they may be made by the agent of the assured in case of the absence or inability of the assured to make them himself.⁶

The courts have generally been disposed to look upon conditions with regard to the forfeiture of claim under a policy of insurance, unless properly attested claims are filed within a certain fixed delay, in a liberal spirit, and they have not always insisted that the proof should be furnished within the delay, especially when this delay is a short one of, say, fifteen days.⁷

And it has also been held in Quebec, when a company received the information given by the assured as to his loss without objection, and afterwards furnished him with a printed form on which

¹ Porter's Laws of Ins. 180, and see Ontario Ins. Corp'n's Act, 1892; 53 Vic., c. 39 (O), s. 43; 60 Vic., c. 36 (O), s. 168, ss. 19; and B.C. Ins. Policy Act, 1893, c. 12, s. 23, & R.S.M. 1891, c. 59, stat. con. 19 & 23.

² Molsons Bank v. Guarantee Co. of N. A., M. L. R. 4 S.C. 376, and see Protest. Bd. of School Com'rs & Guarantee Co., 31 L.C.J. 254.

³ Com'l Mut. Bdg. Soc. of Montreal & the London Guarantee & Acc. Co., 21 R.L. 275.

⁴ Guerin v. Manchester Fire & Life Ins. Co. *infra*, followed in O'Hearn v. Caled. Ins. Co., *infra*, § 385.

⁵ Lampkin v. Ontario M. & F. Ins. Co., 12 U.C.R. 584.

⁶ 60 Vic., c. 36 (O.), s. 168, ss. 12 and 14.

⁷ Black v. National Ins. Co., Q.B., 24 L. C. J. 76; 3 L.N. 29; and see Can. Mut. Fire Ins. Co. v. Donovan, 2 L. N. 229, *infra* § 375, note.

to make his claim, that they had waived their right to contend, that the plaintiff had failed to furnish proof of his loss to the satisfaction of the company, within thirty days from the occurrence of the fire.¹

In this case the decision of the Privy Council in *Whyte v. Western Ass. Co.*² was commented on, and Johnson, J., stated, that the doctrine laid down in that case never extended to saying there could be no waiver, but merely applied the stipulation where there was nothing to modify it.³

But, where a condition of a fire policy requires the making and furnishing of proofs of loss within a specified time, and declares that, until they are furnished, the loss shall not be payable, the delay is a material part of the condition, and, consequently, in the absence of a waiver, the assured cannot recover, unless he sends in the proper proofs within the prescribed delay. The mere silence of the company with regard to proofs sent in, after the delay prescribed by the conditions of the policy, does not amount to a waiver of the condition by the company, nor does the declaration by the company at the time, that it did not consider itself liable, amount to a waiver by the company of the benefit of the condition.⁴

And where one of the conditions in an Ontario policy of insurance against fire on ice and packing, contained in an ice house, situated in the State of Wisconsin, provided, that the proofs of loss should be delivered "as soon after the loss as possible," the evidence showed that the fire occurred on the 17th September, 1881, and the proofs of loss were not delivered until the middle of May, 1882, when they were objected to and returned to the insured, who redelivered them in the same state in the month of July following; and the only reason given for not delivering them sooner was, that it was not convenient to do so:—It was held, that the condition cited was not complied with.⁵

The question of the procurement of proofs of loss being a

¹ *Kelly v. Hoch. Mut. Fire Ins. Co.*, 3 L. N. 63, 24 L. C. J. 298, and see *Dill v. Quebec Ins. Co.*, 1 R. L. 113.

² 22 L. C. J. 215 *infra*.

³ *Kelly v. Hoch. Mut. Fire Ins. Co.*, 3 L. N. 63, *supra*.

⁴ Privy Council, *Whyte v. Western Ins.*, 22 L. C. J. 215, 7 R. L. 106 (not reported in P. C. App. Cas.), but see comment on this decision, Johnson, J., in *Kelly v. Hoch. Mut. Fire Ins. Co.*, 3 L. N. 63, *supra*.

⁵ *Cameron v. Can. Fire & Mar. Ins. Co.*, 6 O. R. 392, *infra* § 370.

condition precedent came up in the recent English case of *Hiddle et al. v. National F. & M. Ins. Co. of New Zealand*,¹ where it appeared, that the policy required the insured, within fifteen days after the fire, to deliver to the company an account in detail of such loss or damage as "the nature and circumstances of the case will admit." After the fire, the insured submitted a statement of loss, which the company refused to accept as sufficient compliance with said condition. It appeared from the evidence, that the insured could have complied with the condition within the fifteen days. At the close of the plaintiffs' case, the judge nonsuited them. It was considered, that plaintiffs were rightly nonsuited, since, even if the question of compliance were for the jury, a verdict could not have been reasonably given in their favor.

But in another English case,² notice of accident was held not a condition precedent. Here, the evidence showed that the policy covered death caused by accident, happening within the United Kingdom, and was made subject to a condition that, in case of fatal accident, notice thereof must be given to the insurers within seven days. The assured was accidentally drowned in Jersey, but it was impossible to give notice within seven days. In an action on the policy, the court decided, that the accident happened within the United Kingdom, and that notice, as said above, was not a condition precedent to the right to recover, and that the insurers were liable.

370. Sufficiency and insufficiency of proofs.—Where it is impossible for the assured to give a detailed statement under oath of his loss, supported by books and vouchers, owing to their being burnt, the condition of the policy requiring such statement will

¹ (Eng. Privy Council App.), Appeal Cases, "The Law Reports" (1896), 372.

² *Stoneham v. Ocean, Railway & Gen. Acc. Ins. Co.*, 19 Q. B. D. 237.

For American decisions as to the furnishing of proofs of loss being a condition precedent, see *Sagers v. Hawkeye Ins. Co.*, 63 N. W. Rep. (1895), 194; and *Shapire v. St. Paul F. & M. Ins. Co.*, 63 N. W. Rep. (1895), 614.—*Sergeant v. Ldn. & Lpl. & Globe Ins. Co.*, 32 N. Y. Suppl. (1895), 594; 66 N. Y. St. Rep. (1895), 162.—*Bruce v. German Sav. & Loan Soc.* (1893), 34 Pac. Rep. 16.—*McCulloch v. Phoenix Ins. Co. of Hartford* (1893), 21 S. W. Rep. 207.

In *McCarvel v. Phenix Ins. Co. of Brooklyn*, 25 Ins. L. J. (1896), 399, the policy provided, as a condition precedent, that proofs of loss be furnished within sixty days, but the court held that, by mixing up indiscriminately things unconditionally required, and others which were not required unless demanded, the company waived the sixty-day limit, and gave an extension to a reasonable time in which to comply with all the demands made together.

be satisfied by his giving affidavit as to the value of the property lost.¹

In an action on a policy of insurance against fire on a stock of goods, *M.*, the local agent, through whom the insurance was effected, stated that he had, at the time, examined the premises and considered, from the size of the store, the appearance of the goods, and the stock book, there were goods to the amount insured. The fire occurred on the 20th October and all the goods on the premises were destroyed. On the same day the defendants' inspector came and saw plaintiff, who furnished him with a statement showing the amount of the stock in May—the insurance having been effected in June—the sales since then, and the invoices of goods purchased up to the fire. The inspector gave plaintiff a form from which he was to, and did fill in, the proof papers sent him by the inspector, and which plaintiff enclosed to defendants in a letter of 27th October, informing them that, if not correct, he would have same made out to their satisfaction. On 31st October, defendants' replied, that they thought the loss in place of \$13,005, the amount claimed by plaintiff, should be \$11,734.90; adding: "This sum, we consider, not only reasonable, but liberal, and which we are liable for, without any prejudice to, or waiver of, any condition of the policy." The plaintiff replied, that his claim was a just and honest one, but, if settled at once, he would accept a reduction of \$400. The defendants then wrote, that their's was a fair and liberal offer, and pointed out what they considered objectionable items in plaintiff's claim. The plaintiff then made and sent to defendants a statutory declaration of loss according to the above form. The defendants then replied, stating that, without admitting, but denying any liability, they drew attention to alleged informalities in not specifying the items of loss in detail, and in not giving a detailed statement of the claim. The plaintiff then furnished them with a statutory declaration, giving such detailed statement. Nothing further was done, and action was brought. The defendants set up a number of defences, amongst which was arson, and imputing fraud and misconduct to the plaintiff, but no evidence was given in support of them:—The court decided, that there was sufficient evidence of the amount of goods at the time the insurance was effected; that the goods insured were those destroyed by the fire;

¹ *Perry v. Niagara Dist. Mut. Fire Ins. Co.*, 21 L.C.J. 257.

and that under section 2 of the Fire Insurance Policy Act, R.S.O. (1877), c. 162, no objection could be raised to the proofs; and in any event the proofs were sufficient:—Held, also, that the letter of 31st October was properly admitted in evidence, for it was not stated to be without prejudice generally, nor was any objection taken to its reception at the trial, the defendants by the letter merely claiming that it should not be deemed a waiver of any condition of the policy, and both parties acted on this view.¹

Delivery of proof of loss and particulars of loss to the local agent is sufficient delivery.²

In *Nixon v. Queen Ins. Co.*,³ where the policy required the assured to forthwith give notice to the company “and within 14 days thereafter deliver in as particular an account of the loss or damage, and of the value of the property, destroyed or damaged, immediately before the happening of the fire, as the nature and circumstances of the case will admit of.....and until such evidence is produced the amount of such loss, or any part thereof, shall not be payable or recoverable,” it appeared that the only statement delivered by plaintiff was to the effect, that a part of the property consisted of general merchandise, and that said merchandise consisted principally of dry goods, boots, shoes, groceries and hardware, the value of which was estimated to be between \$3000 and \$4000.

The court held, setting aside judgment for plaintiff and entering judgment for defendant with costs, that the account delivered was not in compliance with the condition which contemplated an account of the different items.

Where by the policy it was provided, that the loss or damage should be “estimated according to the actual value of the property insured, that is, what it could have been actually sold for in cash at the time of the loss,” and the condition of the policy required, that the affidavit or loss should state the actual cash value of the property, it appeared that in the printed proofs of loss, which were used, the words “actual cash value” were struck out and a statement substituted, giving the cost of the property in 1880, a year

¹ Hartney v. North British & Merc. Ins. Co., 13 O.R. 581.

² Peppit v. North Brit. & Merc., 1 Russ & Geld (Nov. Sc.) 219; German Ins. Co. v. Ward, 90 Ill. 550.

³ 25 Nova Scotia Law Rep. 317, affirmed in Supreme Court of Canada, 20 Feb., 1894.

previous to the insurance being effected. It was held, that this was not a compliance with the policy and conditions, and that, therefore, there could be no recovery on the policy.¹

It has been declared in the United States, that the proof required is such reasonable proof as will give assurance that the event has happened, and such as will satisfy the rules of evidence. What is due proof cannot be determined arbitrarily by the company, as for instance, that a physician's certificate shall be deemed an essential part of the proof.²

The information is the main thing to be regarded in proofs of loss, the form is not important.³

¹ Cameron v. Can. Fire and Mar. Ins. Co., 6 O.R. 392, *supra* § 369.

² Taylor v. Ætna Life Ins. Co., 13 Gray 434; O'Reilly v. Guardian Mut. Life Ins. Co., 60 N. Y. 169.

³ Irwin v. Springfield etc. Ins. Co., 24 Mo. App. 145.

On the subject of sufficiency of proofs of loss, see also:—Moyer v. Sun Ins. Office of Ldn, 35 Atl. Rep. (1896), 221, where the company relied upon a plea of failure to furnish proofs of loss within the time limited by the policy, notice of the fire had been given immediately, and certain information later on, with a request to be informed if anything further was required. It was held, that, in the absence of any indication to the contrary, the details furnished were sufficient to fix the company's liability. See also *infra* § 372, note, p. 615.

The contention of the company, that proofs were insufficient, was not maintained in Davis v. Grand Rapids F. Ins. Co., 36 N. Y. Suppl. 792 (1896), where the assured could not possibly comply with a request for a detailed specification, as the goods had been totally destroyed.—But bills by carpenters as to the cost of re-building were considered not sufficient proofs of loss in Heusinkveld v. St. Paul F. and M. Ins. Co., 64 N. W. Rep. 769 (1895); and the same decision was given in Brock v. Des Moines Ins. Co., 64 N. W. Rep. 685 (1895), the proofs not showing origin of fire and cash value of property, and not having been made by affidavit, as required by the policy and statute.

Duplicate bills of goods, required by the policy, are not a part of the proofs of loss, Ætna Ins. Co. v. McLead *et al.*, 25 Ins. L. J. 669 (1896).

See DeWitt v. Agric. Ins. Co. of W'town, 71 N. Y. St. Rep. 566 (1896), as to who is the proper party to make proofs of loss, where the owner of mortgaged property contracted to sell, the mortgagee procuring an endorsement as to the new ownership, without the purchaser's knowledge, and the latter obtained additional insurance in another company. And *vide* Milw. Mech. Ins. Co. v. Brown, 44 Pac. Rep. 35 (1896), on same subject.—See also Warren *et al.* v. Springfield F. and M. Ins. Co., 35 S.W. Rep. 810 (1896), as to who may make proofs of loss where policy is payable to a third party, or is held as collateral security.

Proofs of loss may be signed by the administratrix-elect, fire having occurred a few days after the death of assured, Meyerson v. Hartford F. Ins. Co., 38 N.Y. Suppl. 112 (1896).

In Wright v. Fire Ins. Co. (1892), 12 Mont. 474, the company's adjusting agent examined the assured under oath, entering into details as to all items and values thereof. These examinations were subscribed to by the assured and the agent referred to them as "proofs of loss," stating that nothing more was required. The court held, that these papers were accepted as sufficient proofs of loss, even though they were not exactly like the ones called for by the policy.—Similarly, it was de-

371. Non-delivery of proofs.—A very recent decision at Montreal is that of *Prevost es qual. v. Scottish Union & National Ins. Co.*¹ The action was brought to recover the amount alleged to be due under two insurance policies, by the curator, to Cleophas Rivet. The plea set up, that plaintiff had not conformed to the conditions of the policies and had not made proofs of loss, and, further, that the action was prescribed. The court held, in the first place, that the ground of defence set up by defendant, to the effect that the premises of Rivet were described in the two policies as 842 Albert street, while in the declaration they were described as No. 846 Albert street, was not well founded, inasmuch as the numbering of the street was changed after the issue of the policies. The other grounds of defence were more serious. By one of the conditions of the policy it was provided, that, if a fire occurred, the insured was bound to give notice of loss in writing to the company, and to furnish proofs. In the present case, neither Rivet, the insured, nor the plaintiff, had furnished any such proof under oath to the company defendant, as was required by this condition. Rivet and representatives were not released from the obligation of furnishing such proof by reason of the insurance company and Rivet having entered into bonds of appraisement, as referred to in the declaration.

cided, *inter alia*, in *Welsh v. London Ass. Corp.* (1892), 151 Pa. St. 607, that the fact, that an adjuster of the company was at the place of the loss, a week after the fire, under instructions of the company, was conclusive evidence of notice to them. The proofs in this case were conceded to be informal, but it was held, that the circumstances, under which they were delivered, put upon the insurers the duty of notifying the assured of their objections, if the want of form was to be relied upon, and the failure to give such notice was evidence for the jury of a waiver. Reference was also made to the Act of June 27, 1883, § 1 (P. L. Pa. 1883-165), according to which notice and proof may be delivered to the company at its general office, or to the agent who countersigned the policy, and which also fixes the time therefor.

In *McNally v. Phoenix Ins. Co.* (1893), 137 N. Y. 389, a statement that the fire did not originate by any act, etc., of the assured, etc., was held sufficient, as they, in fact, had no knowledge or information whatever as to the origin and circumstances of the fire.

Proofs of loss under a fidelity insurance bond are mercantile documents and are only required to contain a brief and general statement of the facts with substantial accuracy, truthfully informing the insurer how the loss occurred, and not tending, either by what they contain or what they omit, to mislead the insurer. It has, therefore, been held in *American Surety Co. v. Pauly*, 72 Fed. Rep. (1896), 484, that proofs, setting forth with reasonable plainness, that certain sums of money had been taken from the bank by means of acts of the cashier, described in such proofs, were sufficient.

Montreal, 3 May, 1897, Court of Review; not yet reported.—If no proofs of loss are furnished, the liability of the insurer does not attach, unless proof has been waived: *Leadbitter v. Aetna Ins. Co.*, 13 M.E. 265; *Davis v. Davis*, 49 M.E. 282.—See also *Dupuis v. N. B. & M. Ins. Co.*, *supra* § 368, n. 1.

The court held further, that plaintiff's excuse, that Rivet and his representatives were unable to furnish such proofs of loss in consequence of the loss of the policies, could not avail plaintiff, inasmuch as it was not alleged or proved that the policies were lost prior to the fire or within 60 days thereafter. On the contrary, it appeared that Rivet had the policies in his possession at a date seven months after the fire. The action was, therefore, dismissed.

Under certain circumstances, however, the assured will be relieved from the consequences of non-delivery and insufficiency of proofs. The following is a case in point—

“Upon a policy, issued by a mutual company, the statutory conditions were endorsed with variations, one of which was (being the same as section 56 of the Mutual Act, R. S. O. (1877) c. 161), that the proofs, declarations, etc., called for by the statutory conditions, should be furnished to the company in writing within thirty days after the loss. The loss occurred on the 2nd October, 1878, and on the 5th the plaintiff notified the defendants by letter. A few days after, the plaintiff saw one S., an agent of the defendants for obtaining applications, though not for collecting claims, but who had acted for plaintiff in settling a previous loss with defendants, and asked him to act for him on this occasion and do what was proper, which S. promised to do.

On 17th October, the defendants' president came up and saw plaintiff, who informed him of the loss and of all the circumstances relating thereto, and plaintiff was told by him, in answer to his enquiry, that nothing further need be done. The plaintiff, in consequence, did nothing; but subsequently, on hearing that the defendants disputed the claim, some correspondence took place, which resulted in the plaintiff employing a solicitor, and proofs were thereupon put in, but after the lapse of thirty days. It was held, affirming the judgment of the Court of Common Pleas,¹ Burton, J., dissenting, that section of R. S. O. (1877) c. 162, relieving the insured under certain circumstances from forfeiture for non-delivery of the proofs of claim applies to mutual insurance companies, and to the time of delivery as well as to insufficiency in the proofs. It was also held, Burton, J., dissenting, under the facts set out in the report, that the omission to deliver the proofs in proper time arose from accident or mistake, within the meaning

¹ 31 C. P. 562.

of that clause. Remarks were made as to the construction and effect of this clause and the extent of the discretion given by it to the court or judge.¹

372. Magistrate's certificate.—It is customary to append to preliminary proofs, as a necessary part thereof, the certificate or *jurat*, of a magistrate or notary public, residing "nearest to," or "most contiguous to," the locality of the fire, and hence supposed to know the facts set forth in the proofs, and stating his belief as to the honesty of the claimant, and his opinion as to the amount of the loss sustained by him, which may or may not be the amount named in the proofs. Such magistrate must have no personal interest in the property or the claim, nor be related to the insured. This certificate dates from the earliest days of fire insurance outside of cities, where the "nearest minister," or, in his absence, a "churchwarden," or "reputable neighbor," was to make the certificate.

When insisted upon by the company, its production is a condition precedent to recovery under the policy.²

In an appeal before the Supreme Court of Canada, the evidence showed that the policy of insurance against fire required, *inter alia*, such a certificate, under the hands of two magistrates most contiguous to the place of fire; and stipulated, further, that no one of the foregoing conditions, etc., shall be deemed to have been waived, etc., unless the waiver be clearly expressed in writing by endorsement upon the policy, signed by the agents of the company at Halifax, N.S. The insured premises having been destroyed by fire, the assured applied to two magistrates contiguous to the place of the fire for the required certificate, which they refused, and he finally obtained such certificates from two magistrates residing at a distance from such place. The proofs of loss, accompanied by the certificate, were sent to the agent, who subsequently made an offer of payment to compromise the claim, stating that, if such offer was not accepted, the claim would be contested. The agent, on a subsequent occasion, told the assured, that he objected to the claim, as he "did not think it was a square loss."

The court held, affirming the judgment of the court below,

¹ *Robins v. Victoria Mut. Fire Ins. Co.*, 6 A. R. 427, *supra* § 368.

² *Griswold*, 389; and see 60 Vic., c. 36 (O.), s. 168, ss. 13c.

that the non-production of the certificate, required by the above condition, prevented the assured from recovering on the policy. And also, that, even if such conditions could be waived without endorsement on the policy, the acts of the agent did not amount to a waiver.

Semble, that the condition could not be so waived.¹

And in another case,² it was also held, that the procurement of a magistrate's certificate is a condition precedent, and if a certificate be procured in which a knowledge and belief as to the amount of loss is omitted, it will be insufficient.

The obligation of the assured to procure a magistrate's certificate as part of his proofs of loss has very frequently led to differences in the United States. A reference to a number of cases will suffice to show the view which the courts have taken there on this subject.³

¹ Supreme Court of Canada, *Logan v. Comm. Union Ass. Co.*, 13 S. C. R. 27, and see *Racine v. Equitable Ins. Co. of London*, 6 L. C. J. 89 *infra*, and see *supra* § 322.

² *Q. B.*, *Scott v. Phoenix Ass. Co.*, *Stuart's Rep.* 132; *Privy Council*, *Stuart's Rep.* 354; and see *Racine v. Equitable*, 6 L. C. J. 89, *supra*.

³ In *McNally v. Phoenix Ins. Co.* (1893), 137 N.Y. 389, the policy obliged the assured to furnish a magistrate's certificate "if required." Proofs of loss were returned by the company, because no such certificate had been procured, which, however, was finally sent, and suit was brought before sixty days from its reception had expired. The court, in dismissing the company's claim that the action was premature said, that the certificate was not an absolute requirement of the policy, nor necessarily a part of the proofs of loss, the assured being only bound to furnish it "if required." If the demand was made, he could comply with it in a reasonable time and before the commencement of the action, using due diligence to procure it, but the fact of its not being attached to the proofs of loss was no reason for returning these papers, which would have been perfectly good without the certificate, if the company had failed to call for it. An important point in this case was the long delay, nearly a year, which elapsed before the certificate was procured. The testimony, however, showed, that the assured applied to three magistrates, two of them declining to give the certificate after keeping the papers for several months. The judge said on this question:—"I am not aware of any provision of law which requires an officer to give such a certificate. It is quite conceivable that cases may occur, where the assured would be unable to procure the certificate, and if he could not, after reasonable diligence, it would be a harsh rule that would deprive him of his cause of action for that reason."

See also *Agric. Ins. Co. of W'town v. Bemiller* (1889), 70 Md. 400, for a similar case; and *Paltrovitch v. Phoenix Ins. Co. of Hartford* (1893), 68 Hun. 304, and *Brown v. do.* (1889), 52 Hun. 260, where the court declared, that the provision "should receive a practical, reasonable construction," and as stated by Nelson, C.J., in *Turley v. North Amer. Ins. Co.*, 25 Wend. 374 *et seq.*, "full legal effect should always be given to it for the purpose of guarding the company against fraud or imposition; beyond this, it would be sacrificing substance to form, following words rather than ideas."

For other recent decisions regarding certificate of a magistrate or notary public as a condition precedent, see *Oswalt v. Hartford Fire Ins. Co.*, 34 Atl. Rep. (1896)

373. Notice and proofs by third parties interested.—It has been held in Quebec, that the person to whom loss is payable can give as valid a notice of loss to the insurer as the owner can.¹ But the contrary rule prevails in Ontario, Manitoba and British Columbia;² except that, in British Columbia, proofs of loss may be made by a mortgagee to whom the policy is payable with company's consent;³ and in Ontario, a mortgagee with whom the company has dealt as such, may bring an action against them, notwithstanding the statutory condition.⁴

It has been further held in Quebec, that, when the loss under a policy of fire insurance on goods is made payable to a party other than the person who effected the insurance, and such third party becomes owner of the goods by a transfer to him of the warehouse receipts of such goods, such third party becomes thereby the party insured and can, therefore, legally make all necessary preliminary proofs of loss.⁵

In one Ontario case it was shown, that after a loss the insur-

735; 175 Pa., 427; and *Swearinger Bros. v. Pac. Fire Ins. Co.*, 2 Mo. App. Rep. (1896), 1331.

In *Home Fire Ins. Co. v. Hammang et al.*, 24 Ins. L. J. (1895), 493, the validity of such a provision was doubted, the court saying, that the constitution guarantees to the citizen a remedy by due course of law for any injury to himself, his property, or his reputation, and that it seems that the right of an insured to maintain an action cannot be made to depend upon his first furnishing a certificate as to his moral character, financial standing, and a notary's opinion of the loss. See *infra* § 375, note, p. 618, and § 376, note, p. 622.

But see also *Gottlieb v. Dutchess County Mut. Ins. Co.*, 35 N.Y. Suppl. (1895), 71; 60 N.Y. St. Rep. (1895), 250, where it was said, that recovery could not be had when magistrate's certificate was returned, because it was not that of the magistrate nearest the fire and was not furnished within sixty days. See *infra* § 376, note, p. 623.

In *Moyer v. Sun Ins. Office of London*, 35 Atl. Rep. (1896), 221, the court decided, that the assured is not obliged to furnish a magistrate's or notary's certificate unless specially notified so to do, and a notification that the terms of the policy must be strictly complied with, is not such special notice as will bind the assured. See also *supra* § 370, note, p. 610.

In *Summerfield v. Phoenix Ass. Co.*, 24 Ins. L. J. (1895), 442, a requirement in the policy providing for a builder's certificate, as part of proofs of loss, was held sufficiently complied with by an itemized estimate of the cost of re-building from a responsible firm of builders, but not sworn to, and attached to the preliminary proofs after the expiration of the time stipulated in the policy for furnishing preliminary proofs of loss.

¹ *National Ins. Co. of Ireland & Harris*, 17 R.L. 230, M.L.R., 5 Q.B. 345, and see *Guerin v. Manchester Fire Ins. Co.*, *infra*.

² 60 Vic., c. 36 (O), s. 168, ss. 12.—R. S. M. 1891, c. 59, stat. con. 12.—B.C. Ins. Policy Act, 1893, c. 12, stat. con. 12.

³ 58 Vic., c. 22, sec. 4, (B.C.)

⁴ *Mitchell v. City of London Ins. Co.*, 15 A.R. 262.

⁵ *Stanton & Home Ins. Co.*, 24 L.C.J. 38.

ance company received certain proofs of loss from the mortgagees ; they made no objection to them for many months after, and gave no notice that further proofs were required. When paying the loss, they alleged that they were entitled to be subrogated to the rights of the mortgagees, and that they objected to recognize any claim by the mortgagor, by reason of non-compliance with the statutory conditions as to proof of loss. It was held, that they must be taken to have dealt with the mortgagees as agents of the mortgagor, and that they had waived further proofs of loss ; and that the payment enured to the benefit of the latter.¹

In the very recent case of *Manchester Fire Ins. Co. v. Guerin*,² it seems to have been taken as settled that proofs of loss might be given by the mortgagee, to whom loss is payable under the mortgage clause.

By the 17th condition in c. 162, R.S.O., a loss is not payable until 30 days³ after proofs of loss are put in, unless otherwise provided by statute or agreement of the parties, and it has been decided by the Supreme Court of Canada, that this is a privilege accorded to the company, and, while the time may be further limited by agreement, it cannot be extended.

And per Strong, J., that a variation of the condition by inserting a clause in the policy extending the time is not a variation by agreement of the parties, nor is such varied condition a just or reasonable one.⁴

375. Waiver of proofs of loss.—The much disputed question of waiver of proofs on the part of the company or those acting on its behalf⁵ has received much attention from the courts both in Canada and the United States. Its importance has been fully re-

¹ Bull v. North British Can. Invest. Co., 15 A.R. 421, affirmed in Supreme Court S.C.R. See Anderson v. Saugeen Mut. Fire Ins. Co. of Mt. Forest, 18 O.R. 355.

² R.J.Q., 5 Q.B. 434, now in Supreme Court of Canada ; referred to *supra* § 307, note 5 ; also *supra* page 615, note 1 ; and see Index for other references to same case.

³ Now sixty days, as per 60 Vic., c. 36 (O), s. 80 and s. 168, s.s. 17 ; *supra* § 248 (17).

⁴ Supreme Ct. of Canada, City of London Fire Ins. Co. v. Smith, 15 S.C.R. 69 ; and see as to variation of stat. con. 17, *infra*, chap. XXII.

It was said in Home Mut. Ass. v. Seager, 123 Pa. St. 533, that the insurer is not bound to wait the whole of the specified time before making payment, in order to give possible claimants an opportunity to make known their claims. And in McConnell v. Iowa Mut. Aid Ass., 79 Iowa 757, on the other hand, the court said, that a waiver of proofs does not create a liability to pay prior to the expiration of the period allowed therefor.

⁵ See also *supra* § 330 e, as to agents' power with regard to proofs of loss-

cognized, and the courts seem to have endeavored to enforce not so much the letter of the law, as to ascertain the spirit which prompted the enactment of the legislative safeguards thrown about the contract of insurance.¹

A refusal to pay on other grounds is not a waiver of insufficient notice of death. This decision was given by the Supreme Court of Canada in the case of *Acc. Ins. Co. of N.A. v. Young*,² where the policy provided, *inter alia*, that "in the event of any accident or injury, for which claim may be made under the policy, immediate notice must be given in writing, addressed to the manager of the company at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice, shall invalidate all claims under the policy."

On the 21st March, 1886, the insured was accidentally wounded in the leg from falling from a veranda, and, within four or five days, the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued on the 13th April following.

The local agent of the company at Simcoe, Ont., received a written notice of the accident some days before the death, but the notice of the accident and death was only received at Montreal on the 1st May. The manager of the company acknowledged receipt of proofs of death which were subsequently sent, without complaining of want of notice, and ultimately declined to pay the

¹ In the United States, it has been said that, generally, any statement or conduct on the part of an insurance company or its general agent, which would fairly give the assured to understand, that formal proofs of loss are unnecessary, will amount to a waiver of such proofs. And where proofs of loss are furnished to the insurer to which it objects, it must return the same with its objections, within a reasonable time, or its objections will be unavailing. *Vide* on these points:—*Walker v. German Ins. Co. of Freeport*, (Kan. 1893), 33 Pac. Rep. 597. *Union Ins. Co. of California v. Barwick*, (Neb. 1893), 54 N. W. Rep. 519; cited *supra* § 363, note.

A provision concerning proofs of loss is not waived by acts of the company after the lapse of the time stipulated, unless they operate as an estoppel. To constitute a waiver, the insurer must have acted, during the period stated in the policy, in such a manner as to induce a reasonably prudent man to believe that proofs would not be required, or, if required, that the time therefor was immaterial. Silence is not a waiver. It is otherwise, however, where the proofs are received and retained by the company within the time allowed by the policy, or where they are received after the time, and the company adopts a line of conduct to the prejudice of the assured. *Bolan v. Fire Ass'n of Philadelphia*, 58 Mo. App., 225, and *Cohn v. Orient Ins. Co.*, 1 Mo. App. Rep. (1895), 511, referred to *infra* § 376, note, p. 624.

² 20 S. C. R. 280; referred to *supra* § 365.—*Duharme v. Mut. Fire Ins. Co. of Laval*, etc., 2 L. N. 115, was to the contrary. See also *O'Hearn v. Caled. Ins. Co.*, *infra*, § 385.

claim, on the ground that the death was caused by disease and, therefore, the company could not recognize their liability.

It was held, reversing the judgment of the court below, Fournier and Patterson, J. J., dissenting, that the company had not received sufficient notice of the death to satisfy the requirements of the policy, and that, by declining to pay the claim on other grounds, there had been no waiver of any objection which they had a right to urge in this regard.

The refusal by the company to entertain the loss of the insured has been held by the Court of Appeals in Quebec to be a renunciation on their part of their right to exact details of the loss before suit.¹

And in another Quebec case it was held, that a condition of the policy, requiring notice of loss to be given and a particular statement thereof to be delivered by the insured, within fifteen days after the fire, was waived and dispensed with by a distinct denial of liability and refusal to pay on the part of the company, made before the period for furnishing proofs had expired.²

But not by their mere silence.³

¹ Agric. Ins. Co. of Watertown, v. Ansley, 17 R. L. 108; and see Mitchell v. City of London Fire Ins. Co., 12 O. R. 706 *infra*.

² Herald Co. v. Northern Ass. Co., M.L.R. 4 S.C. 254. Ouimet v. Glasgow and London Ins. Co., 19 R.L. 27.

³ Garceau v. Niagara Mut. Ins. Co., referred to *supra* § 369, note, 3 Q.L.R. 337, and see Canadian Mut. Fire Ins. Co. v. Donovan 2 L.N. 220, and Kelly v. Hoch. Mut. Fire Ins. Co., 3 L.N. 63, *supra* § 369.

For denial of liability constituting a waiver of proofs of loss, see:—German Ins. and Savings Inst. v. Kline, 62 N. W. Rep. (1895), 857. Continental Ins. Co. v. Chew, 38 N. E. Rep. (1894), 417. Gerling v. Agric. Ins. Co., 24 Ins. L. J. (1895), 385. Dwg.-House Ins. Co. v. Brewster, 24 Ins. L. J. (1895), 284. Stephens v. German Ins. Co., 1 Miss. App. Rep. (1895), 347. Home F. Ins. Co. v. Fallon, 24 Ins. L. J. (1895), 690. Hanover F. Ins. Co. v. Schrader *et al.*, 31 S. W. Rep. (1895), 1100.—Girard F. & Mar. Ins. Co. *et al.* v. Frymier *et al.*, 32 S. W. Rep. (1895), 55, denial of liability, after having accepted certain statements, held a waiver.—Home Fire Ins. Co. v. Hammang *et al.*, 24 Ins. L. J. (1895), 493, waiver by refusing to pay on the ground that the policy was not in force at the date of the destruction of the property.—Probst. v. Ins. Co. of N. A., 2 Mo. App. Rep. (1896), 1016, a letter setting forth objections to proofs of loss and intimating that the company, while not liable, might yet entertain a proposition of compromise, was declared to be a denial of liability and a waiver of proofs.—Norris v. Farmers Mut. F. Ins. Co., 2 Miss. App. Rep. 1171 (1896), waiver of proofs by denying liability on the ground of over-insurance; see also Gross *et al.* v. Milw. Mech. Ins. Co., same v. Western Ass. Co., 25 Ins. L. J. 631 (1896).—Proofs of death under an accident insurance policy are waived by the declaration of an officer of the company to the beneficiary that it would be of no use to make proofs, because the insurance did not cover such a case, Metrop. Acc. Ass'n v. Froiland, 25 Ins. L. J. 595 (1896).

Denial of liability by an adjuster is the denial of the company and waives the

In another Quebec case it was ruled, that a condition in a policy of insurance to the effect that all persons insured shall, as soon after a fire as possible, deliver in a particular account of their loss or damage, is waived by the fact of the agent of the company, and the person insured, each choosing valuers, who make a valuation of the loss, and by the fact of the company offering the assured a less amount than the valuation in settlement, showing that they only disputed the amount to be paid.¹

376. Mistakes in proofs—Waiver of defects and insufficiency.

—The United States courts have frequently had occasion to pronounce upon mistakes in proofs of loss, and the general trend of

filling of proofs of loss, so decided in *Dwg.-House Ins. Co. v. Osborn*, 24 Ins. L. J. (1895), 751. *Home Ins. Co. of N. Y. v. Gibson*, 24 Ins. L. J. (1895), 453. *Trundle v. Prov. Wash. Ins. Co.*, 54 Mo. App. 188. *Lpl. and Ldn. and Globe Ins. Co. v. Tillis*, 17 So. Rep. (1895), 872.—Proofs handed to company's adjuster by the agent of the assured were held sufficient in *Roberts et al. v. N. W. Nat. Ins. Co.*, 62 N. W. Rep. (1895), 1048.—An adjuster, finding the loss total and in excess of the amount insured, said that it would be paid, and agreed to prepare proofs, but did not do so. This was held a waiver of proofs in *Davidson v. Guardian Ass. Co. of London*, 35 Atl. Rep. (1896), 220.—An adjuster telling plaintiff that the policy was void, because benzine had been kept in the building, was held to constitute a waiver of proofs of loss in *Faust v. Am. F. Ins. Co.*, 61 N. W. Rep. 883 (1895).—As regards the question of an adjuster's authority, it was said in *First Nat. Bk. of Devil's Lake v. Manch. F. Ass. Co.*, 25 Ins. L. J. 272 (1896), that, in the absence of evidence to the contrary, it will be presumed that he had power to waive proofs, and his action in taking possession of the *debris* and selling the same is *prima facie* evidence of his authority.

Proofs of death have been held waived in *O'Rourke v. John Hancock Mut. L. Ins. Co.*, 24 Ins. L. J. (1895), 160, and in *Nat Life-Maturity Ins. Co. v. Whitacre*, 43 N. E. Rep. (1896), 905, by company denying liability.

In *Travelers Ins. Co. v. Melick*, 24 Ins. L. J. (1895), 430, it was said, that statements as to the cause of death in proofs are conclusive upon the party who makes them, only until he gives the company reasonable notice that he was mistaken, after which they have the effect of solemn admissions under oath against interest, but are not conclusive.

A beneficiary is not estopped by statements, made in proofs of death, as to age of assured : *Schmitt v. Nat. Life Ass'n*, 32 N. Y. Suppl. (1896), 513 ; 65 N. Y. St. Rep. (1895), 737. See also *Yore et al. v. Booth*, 42 Pac. Rep. 808 (1896).—With regard to an affidavit of a beneficiary, it was declared proper in *Bankers Life Ass. v. Lisco*, 25 Ins. L. J. 388 (1896), to permit the affiant to show that she never knowingly subscribed to or made the statements in the affidavit which were contrary to representations of the insured in his application.

¹ *Converse v. Prov. Ins. Co. of Canada*, 21 L. C. J. 276.

See *Home F. Ins. Co. v. Bean*, 60 N. W. Rep. (1894) 907, for waiver of proofs of loss by demanding arbitration.—*Hobson v. Queen Ins. Co.*, 2 Ohio Decisions 475, waiver by company moving insured property after fire so as to deprive the owner of the opportunity of making out proper proofs of loss.—*Sagers v. Hawkeye Ins. Co.*, 63 N. W. Rep. (1895), 194, proofs of loss were held waived when nearly all the books of the assured had been destroyed in the fire and the company demanded duplicate bills, which it was not his duty to procure under the terms of the policy ; *supra* § 369, note, p. 607.

ruling is, that the assured is not estopped from showing a mistake made in his statements, even as to a material fact, but without any fraudulent intent, though the proofs be sworn to as correct.¹

If the proofs of loss made out by the claimant do not comply with the provisions of the policy or the rules laid down by the

¹ *Vide* Wood, 427, quoted in Waldeck v. Springfield F. & M. Ins. Co. (1881), 53 Wis. 129; also Beach, 1227; and Parker v. Amazon Ins. Co., 34 Wis. 363, in which case the proofs were made out by the agent of the company and sworn to by one of the owners, who testified on the trial that he did not know what they contained.

The above principle was recognized in Stache v. Ins. Co., 49 Wis. 89, and in Dogge v. Ins. Co., 49 Wis. 501.

In McMaster v. Ins. Co., 35 N. Y. 222, the question was very clearly and ably discussed in the opinion. The proofs in this case contained a statement as to other insurance at the time of issuing the policy. The judge, in giving the opinion, said:—

“The proofs of loss are no part of the contract of insurance, nor a part of any contract. The contract of insurance requires that they shall be rendered, but it does not make them, when rendered, a part of itself, as sometimes an application is made. They are the act or declaration of one of the parties to a pre-existing contract, in attempted compliance with its conditions. The other party to the contract is not a party to this act or declaration, takes no part in making it, does not assert that it is a true statement, and is not bound thereby. The instrument, which makes the proof of loss, may be amended by the insured at his will, subject always to the necessity that it be furnished to the insurer in such reasonable time as to meet the requirements of the conditions of the policy.”

In another part of the argument, when speaking of the doctrine of estoppel, the judge said:—“The proofs of loss do not create the liability to pay the loss. They do no more in this aspect than set running the time, at the end of which the amount contracted for shall become payable, and at which action may be brought to enforce the liability. All the elements in an *estoppel in pais*, are lacking.” Equally clear and emphatic is the decision in Parmelee v. Hoffman Ins. Co., 54 N. Y. 193. See also Aetna Ins. Co. v. Stevens, 48 Ill. 31; Commercial Ins. Co. v. Huckberger, 52 Ill. 464. The cases of Campbell v. Ins. Co., 10 Allen 213, and Irving v. Excelsior Fire Ins. Co., 1 Bosw. 507, which are mainly relied on to support the opposite view, that the assured cannot on the trial contradict the proofs of loss and establish a different state of facts, by showing that the proofs were made under mistake, are commented on by Judge Folger in McMaster v. Ins. Co., *supra*. In the former case, Judge Dewey observes, that “we do not mean to say that the party may not correct mistakes of fact in his original statement, but such corrections are not for the first time to be made known to the insurers at the time of the action to recover for the loss, by the introduction of evidence showing that the statements filed were not true in a material fact, which, if it existed as stated, was fatal to the right of the insured to recover.”

The Wisconsin Supreme Court, however, held in several cases, that an honest or unintentional mistake in the proofs of loss under a fire policy will not necessarily prevent a recovery thereon, even though notice of the error is not given the insurers until the trial.

In Erb v. German-Am. Ins. Co., 67 N. W. Rep. 533, (1896), the court decided, that over-valuation in proofs of loss, through inadvertence and with no intent to defraud, does not defeat plaintiff's right to recover.—See also Hubbard v. North. Brit. & Merc. Ins. Co., 57 Mo. App. 1.—And in Comm. Ins. Co. of California v. Friedlander *et al.*, 24 Ins. L. J. (1895), 789, it was said, that the mere fact that the insured, in his proofs of loss, valued the property destroyed at \$9,840, while the real loss, as found by the jury, was only \$1,277, does not establish a fraudulent over-valuation.

legislature, the entire claim may be imperilled, but an insurer will be considered to have waived the plea of insufficiency if he retains the proofs without calling attention to their defects.¹

On the same principle, it has been decided in the United States, that when a statement of loss is furnished within the stipulated time, and there is nothing to show that it was not in good faith intended as a compliance with the terms of the policy, it is the duty of the underwriter, if it means to rely upon failure to comply, to give prompt notice of its objection, specifying the defects therein, in order that the assured may have an opportunity of correcting them. A failure on the part of an underwriter to so return the statement, is some evidence for the jury of a waiver of strict compliance.²

¹ Wilson, C.J., in *Mitchell v. City of London Fire Ins. Co.*, 12 O.R. 706.

² *Whitmore v. Dwelling House Ins. Co.* (1892), 148 Pa. St. 405.—See also *Weiss v. Am. Fire Ins. Co.* (1892), 148 Pa. St. 349, where the company denied all liability and the adjuster attempted to settle; formal proofs of loss were sent nine days after the time allowed by the policy and were retained by the company without objection. The court decided that the company could not take advantage of the delay.

Where defects are found in proofs of loss, capable of being remedied, if intelligibly pointed out, failure on the part of the insurer to make known to the claimant the defect, within a reasonable time, is deemed to be a waiver; and what is a reasonable time is a question for the jury: *Merc. Ins. Co. v. Holtham*, 43 Mich. 423; *Titus v. Glens Falls Ins. Co.*, 81 N.Y. 410; *Timayenis v. Union Mut. L. Ins. Co.*, 21 Fed. Rep. 223; *Fire Ins. Comp. v. Feirath*, 77 Ala. 201.

As to waiver by retaining proofs of loss, see also:—*Palmer v. Great Western Ins. Co.*, 62 N.Y. St. Rep. (1894), 503; 30 N.Y. Suppl. (1894), 1044; and *German Ins. Co. of Freeport v. Hall et al.*, 41 Pac. Rep. (1895), 60.

If the company, when notified of the death and requested to furnish blank proofs of loss, refuse to do so, on the ground that the policy is void, or that it is not liable for the loss, such conduct will be held a waiver of proofs and they need not then be supplied: *Grattan v. Metrop. Life Ins. Co.*, 80 N.Y. 281; *Payne v. Mut. Relief Soc.*, 6 N.Y. St. Rep. 365.

But in *Standard L. & A. Ins. Co. v. Strong*, 41 N.E. Rep. 604 (1895), the court held that, inasmuch as the contract did not provide that the company would furnish blanks for proofs of death, the mere fact that the company "accepted and retained" the proofs of death, or failed to furnish blanks to enable the claimant to make proof, does not constitute a waiver of such proof; that, if the proofs were furnished too late, the mere fact that they were retained does not revive the company's liability; and that the mere fact that it refused to acknowledge such liability, cannot be taken as a waiver of proof of the injury.

The retention by an insurance company of proofs of loss, without objection, is a waiver of its right to object to them for insufficiency:—

The following cases are all to this effect:—*Germania Fire Ins. Co. v. Stewart et al.*, 42 N.E. Rep. 286 (1895);

Northern Ass. Co. v. Samuels et al., 33 S.W. Rep. 239 (1896);

Royal Ins. Co. v. McIntyre, 34 S.W. Rep. 699 (1896);

Norris v. Farmers' Mut. Fire Ins. Co., 2 Miss. App. Rep. 1171 (1896);

Dantel v. Penn. Fire Ins. Co., 2 Miss. App. Rep. 1255 (1896);

Millers Nat. Ins. Co. v. Jackson Co'y Milling & Elev. Co., 60 Ill. App. 224;

As we have seen, the assured is bound to give notice and submit proofs of loss within the time stipulated therefor, and a failure to conform to this requirement will, under ordinary circumstances, involve a forfeiture of his claim.¹

Probst v. Am. Central Ins. Co., 2 Miss. App. Rep. 1280 (1896);
Morotock Ins. Co., v. Check, 25 Ins. L. J. 649 (1896);
Grogan v. United States Industrial Ins. Co., 36 N. Y. Suppl. 687 (1896);
National Life Maturity Ins. Co. v. Whitacre, 43 N. E. Rep. 905 (1896);
Standard Life & Acc. Ins. Co. v. Koen, 33 S. W. Rep. 133 (1895);
DeVan v. Com. Trav. Mut. Acc. Ass. of Am., 36 N. Y. Suppl. 931 (1896).

Defects in proofs of loss were also held waived in *First Nat. Bk. of Devil's Lake v. Am. Central Ins. Co.*, 24 Ins. L. J. (1895), 56, by retaining proofs without objection; and where proofs substantially conformed to the requirements of the policy, as in *German Mut. Ins. Co. v. Niewedde*, 39 N. E. Rep. (1895), 534, the company, denying liability on other grounds, must be deemed to have accepted the proofs as a compliance with the policy.—In *Am. Central Ins. Co. v. Heavenin*, 16 Ky. L. Rep. (1894), 95, where the company claimed the proofs were not such as required by the policy, the court decided that the right to require further proofs had been waived on the part of the company by announcing that it did not intend to pay on other grounds.

If a company gives the assured to understand that only a compromise will be entertained, unless an inventory destroyed in the fire and to which it is not entitled under the policy, be furnished, as shown in *Phoenix Ins. Co. v. Center*, 31 S. W. Rep. (1895) 446, it waives formal proofs of loss.

Insufficiency of the proofs of loss has been held waived in *Home Fire Ins. Co. v. Hammang et al.*, 24 Ins. L. J. (1895) 493, where the adjuster went through all the formalities of the adjustment, offered a sum in settlement, and the company, retaining a paper called "proof of loss," made no complaint nor requested any further proof. See also *supra* § 372, note, p. 615, and § 375, note, p. 618.

¹ If, however, the delay in furnishing proofs or giving notice is in any way attributable to the insurer or caused by him, the delay will not be regarded: as in *Little v. Phoenix Ins. Co.*, 123 Mass. 390; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; or as in *Supreme Sitting Order of the Iron Hall v. Steen*, 22 N. E. Rep. 136, where the proper officer refused to certify to plaintiffs.

For waiver of delay in furnishing proofs of loss by statement of agent, that the company would not take advantage of the delay, especially where the policy did not provide for a forfeiture in such a case, see *Burlington Ins. Co. v. Tobey*, 30 S. W. Rep. (1895), 1111.

In *German Ins. Co. v. Brown*, 29 S. W. Rep. (1895), 313, it was held that proofs not being furnished until after the expiry of the stipulated time was not a cause for forfeiture, but that it was a requirement that proofs should be furnished before the action could be maintained. See also *Carey v. Allemannia Fire Ins. Co.*, 25 Ins. L. J. 137 (1896), delay in making proofs not waived by retaining same without objection.

In *Koller v. German-Am. Ins. Co.* (1893), 8 N. Y. L. J. 1029, proofs were furnished too late, but complainant alleged a performance of all the conditions by serving on a certain day notice and proofs of loss, and the court sustained a demurrer, unless the complaint was amended. The numerous cases of precedent, quoted by the court in this action, were; *McDiarmid v. Ins. Co.*, 44 N. Y. Sup. Ct. 221; *Underwood v. Ins. Co.*, 57 N. Y. 500; *Blossom v. Ins. Co.*, 64 N. Y. 162; *Quinlan v. Ins. Co.*, 133 N. Y. 356, where proofs of loss were held a condition precedent to any right of action unless waived. And on the obvious distinction between acts amounting to waiver before breach of forfeiture and those occurring afterwards: *Brown v. Ins. Co.*, 40 Hun. 101 *et seq.*; *Blossom v. Ins. Co.*, *supra*. As to retention, without objection, of proofs timely served acting as a waiver of all technicalities or informalities, which might

have been corrected if they had been promptly pointed out : *Titus v. Ins. Co.*, 8 Abb. N.C. 315; s.c. 81 N.Y. 410; *Richards on Ins.* 85. Proofs being held waived altogether, where the company led assured to suppose that none would be required : *Lowry v. Ins. Co.*, 32 Hun. 329; or where by its conduct it led to delays which it afterwards complained of : *Van Allen v. Ins. Co.*, 10 Hun. 397, affirmed 72 N.Y. 604; *Goodwin v. Ins. Co.*, 73 N.Y. 480; *Bishop v. Ins. Co.*, 130 N.Y. 388. Where proofs were not served in time, and the objection was deemed waived, because the company retained the proofs and put its refusal to pay on other grounds : *O'Reilly v. Ins. Co.*, 19 W. D. 147; *Owen v. Ins. Co.*, 10 Abb. N. S. 166, note; *Bennet v. Ins. Co.*, 15 Abb. N. C. 234. A company may refuse to pay a loss, without specifying any ground, and, when sued, may insist upon any available ground; but, if the company plants itself upon a specific defence and so notifies the assured, it cannot retract after he has acted on its position and incurred expense in consequence of it : *Brink v. Ins. Co.*, 80 N.Y. 108; *Prentice v. Ins. Co.*, 77 N.Y. 483; *Goodman v. Ins. Co.*, 73 N.Y. 480; *Titus v. Ins. Co.*, 81 N.Y. 410, *supra*; *Weed v. Ins. Co.*, 133 N.Y. 394. While a waiver of forfeiture need not be based upon a technical estoppel, yet, in the absence of an express waiver, some of the elements of an estoppel must exist : *Armstrong v. Ins. Co.*, 130 N.Y. 560; *Ronald v. Ins. Co.*, 132 N.Y. 356. Mere silence of a company, at a time when it was not required to speak, is not a waiver, nor evidence from which waiver may be inferred : *Armstrong v. Ins. Co.*, *supra*.

In *Carpenter v. German-Amer. Ins. Co.* (1892), 135 N.Y. 298, a delay of one hundred and fifteen days was, under the particular circumstances of the case, held not unreasonable. It was there said, that "the performance of the stipulation as to proofs of loss is not made a condition of liability of the insurer by the terms of the policy, but it is a condition of recovery." The court further held, that the insistence of the company upon the right to examine the assured under oath was a waiver of any objection founded on the delay in serving the proofs.

In *Thomas v. Burlington Ins. Co.* (1891), 47 Mo. App. 169, the court declared that, while the company had the right to examine the assured under oath, they had no right to require him to submit to a private examination, and the assured's refusal to submit to an examination, unless his attorney should be permitted to be present, could not prevent his recovery. The court added :—"We can see no reasonable objection to the request by the assured to have his attorney present, while being examined by the company's representative. In so doing, no additional condition was being tacked on to the stipulation of the contract. Rather is it true, that the company was insisting on an additional stipulation."

"The clause above quoted does not require the assured to undergo a private examination, hence the company's representative was calling on the assured to do something not required by the contract. As was said by the court in another case, *Grigsby v. Ins. Co.*, 40 Mo. App. 276, 283, there is surely no impropriety in the assured consulting his legal adviser in matters of this nature. When insurance companies proceed to take these examinations, it is tantamount to a declaration of an intention to contest the claim, and it would seem the part of prudence that the assured have his attorney at hand when anything so important is being done."

See also *Amer. Cent. Ins. Co. v. Simpson* (1890), 43 Ill. App. 98.

For recent decisions of general interest given by courts in the United States in connection with proofs of loss, see :—A statement, that proofs need not be made pending investigation of claim, is not a waiver of proofs, *Allibone v. Fid. and Cas. Co.*, 32 S. W. Rep. 567 (1895).—Forfeiture by failure to furnish proofs as required by policy, *Gottlieb v. Dutchess County Mut. Ins. Co.*, 35 N. Y. Suppl. (1895), 71; 69 N.Y. St. Rep. (1895), 250; cited *supra* § 372, note, p. 615.

Where a policy required a particular account of the loss within thirty days, and also required the insured to submit to an examination, it was held, that the provision for a forfeiture did not apply to a failure to furnish the account as required, *Am. Central Ins. Co. v. Heaverin*, 25 Ins. L. J. 711 (1896).

The opinion of the assured as to the value of his stock is inadmissible where he

can furnish an invoice, made shortly before the fire, and show average daily sales and purchases up to date of fire, *Duff v. Fire Ass'n of Philadelphia*, 56 Mo. App. 355.

Where owing to a mistake of the assured the proofs are received by the company after the expiration of the time fixed in the policy, no claim can be maintained, *Maddox v. Dwg. House Ins. Co.*, 56 Mo. App., 343.

Where there has been no compliance with the terms of the policy as to proofs of loss, and no waiver, there can be no recovery, *Cohn v. Orient Ins. Co.*, 1 Mo. App. Rep. (1895), 511; referred to *supra* § 375, note, p. 617.

A clause in the policy providing that assured shall furnish the company with an inventory of the damaged and undamaged goods, does not require him to furnish an inventory of goods totally destroyed, *Johnston v. Farmers' Fire Ins. Co. of York*, 64 N. W. Rep. (1895), 5.—See also *Boyle et al. v. Hamburg-Bremen F. Ins. Co.*, 24 Ins. L. J. 699 (1895); and *Powers Dry Goods Co. v. Imperial Fire Ins. Co. of London* (1892), 48 Minn. 380.

When proofs of loss are furnished, followed by unsuccessful negotiations, the plea that plans and specifications had not been furnished, will not avail the company as a defence in an action, it being apparent that suit was inevitable, *Monteleone v. Royal Ins. Co.*, 24 Ins. L. J. 531 (1895).

A statement in the proofs of loss that the building destroyed was occupied as a residence up to a certain date, was held not an admission that it remained unoccupied for ten days thereafter, *Hanover F. Ins. Co. et al. v. Parrotte*, 66 N. W. Rep. (1896), 636.

The assured, in the absence of fraud, is not limited in recovery by the amount of loss specified in the proofs, *Bently v. Standard F. Ins. Co.*, 23 S. E. Rep. 584 (1896).

The making of a thorough investigation by the company on its own account, before receiving proofs of loss, is no evidence of a waiver of the requirements of a policy in respect to proofs of loss, *People's Bank of Greenville v. Aetna Ins. Co.*, 74 Fed. Rep. 507 (1896); and *ibidem* the fact of company being informed, that there was fraud in the loss, will not justify assured in concluding that company will resist claim and that the assured will be absolved from making proofs of loss.

The mortgagee must see that proofs of loss are made in order to maintain an action on the policy as modified by the mortgage clause. *Lombard Investment Co. v. Dwg.-House Ins. Co.*, 1 Mo. App. Rep. (1895), 513, and *Southern Home Bldg. and Loan Ass'n v. Home Ins. Co. of New Orleans*, 21 S. E. Rep. (1895), 375; 27 *Lawyers' Reports*, Annotated (1895), 844.

Where a certificate of the attending physician was submitted with proofs of death, the beneficiary cannot afterwards object that the physician's statements are privileged and not binding upon her, *Proppe v. Metrop. Life Ins. Co.*, 34 N. Y. Suppl. (1895), 172; 68 N. Y. St. Rep. (1895), 223.—Unauthorised statements in a physician's certificate as to cause of death are inadmissible in evidence where the cause of death is the vital issue, *Neudeck et al. v. Grand Lodge, A.O.U.W.*, 1 Mo. App. Rep. (1895), 330.—Where the blank forms of proof call for a certificate of the attending physician and he refuses to sign it, the requirement in the policy of sufficient proof of death may be complied with by other proof, *Sun Acc. Ass'n v. Olson*, 59 Ill. App. 217.

Where an accident insurance policy provided for immediate notice of claim and positive proof of death within six months, the assured disappeared on Nov. 9, 1892, and his body was found in the water on April 19, 1893; notice of death was given on May 26, 1893, and proofs were furnished on July 12, 1893; this was held to show a reasonable compliance with the terms of the policy in *Kentzler v. Amer. Mut. Acc. Ass'n*, 60 N. W. Rep. (1894), 1002; 18 N. J. L. J. (1895), 22.—But in *Coldham v. Pac. Mut. L. Ins. Co.*, 2 Ohio Decisions 314, the court decided that no recovery can be had upon an accident insurance policy requiring immediate notice of an accident, proof of death to be furnished within seven months, and action to be begun within a year, where no notice of proofs were given until thirteen months after the acci-

dent, and action was not commenced until subsequently, although the beneficiary made every effort to find witnesses of the accident, and did not know that the death was accidental until the time the notice was given.

See also *Brink v. Guaranty Mut. Acc. Ass'n* (1891), 7 N. Y. Suppl. 847, where further notice was held waived, when company retained the notice given, although it was not technically what the policy required. And *Bushaw v. Women's Mut. Ins. and Acc. Co.* (1889), 8 N. Y. Suppl. 423, where retention, without objection, of an informal statement of the injury, was held to mean, that the proof was satisfactory to the company.—*Manuf. Acc. Indem. Co. v. Fletcher* (1891), 5 Ohio C. Ct. 633, where the clause as to immediate notice was considered not binding, the assured having been delirious for some weeks after the accident.—*Heywood v. Maine Mut. Acc. Ass'n* (1893), 85 Me. 239, where it was held that, if the stipulation requiring notice of accident within ten days has been neither complied with nor waived, there can be no recovery on the policy.—*Cooper v. U. S. Mut. Acc. Ass.* (1890), 10 N. Y. Suppl. 748, as to clause fixing time for commencing action.—(*Vide also infra* chap. XXII).

CHAPTER XVIII.

FRAUDULENT CLAIMS.

377. GENERAL REMARKS.

378. PROVINCIAL LEGISLATION AND

JURISPRUDENCE ON FRAUD IN PROOFS.

379. RECENT AMERICAN DECISIONS.

377. General remarks.—Apart from the cases referred to in the last chapter and in which the evidence disclosed that the cause of the insufficient or irregular compliance with the provisions regarding proofs of loss was to be found in mere carelessness or ignorance on the part of the claimant, or where in any event he could not be charged with a dishonest intent, there are also numerous cases, in which the courts have been appealed to, in order to determine disputes arising from the insurers seeking a cancellation of the contract on the ground of false swearing and attempted fraud in the statements furnished them for the purpose of establishing the demand for compensation.

378. Provincial legislation and jurisprudence on fraud in proofs.—In Ontario,¹ Manitoba² and British Columbia,³ any fraud or false statement in a statutory declaration setting out proofs of loss, vitiates the claim.

There is no similar provision in Quebec, and, unless stipulated, it would not have that effect there; but, when stipulated, it will be enforced.⁴

Where an insurance policy is to be forfeited if the claim is in any respect fraudulent, it is not essential that the fraud should be directly proved, it is sufficient if a clear case is established by presumption or inference or by circumstantial evidence. And the

¹ 60 Vic., c. 36 (O), s. 168, ss. 15.

² R. S. M. 1891, c. 59, stat. con. 15.

³ B. C. Ins. Pol. Act, 1893, c. 12, stat. con. 15.

⁴ Grenier *et vir.* v. Monarch F. & L. Ins. Co., 3 L. C. J. 100. Thomas *et al.* v. Times and Beacon F. Ass. Co., 3 L. C. J. 162. See also *infra*, Pacaud v. Queen Ins. Co.

assignee of the policy cannot recover on it, if fraud is established against his assignor.¹

In an Ontario case, however, where the plaintiff did not in his declaration of loss disclose an encumbrance in favor of his father, the jury did not find nor were they asked to find, that there was any fraud or false statement in the plaintiff's statutory declaration. It was held, that fraud or a wilfully false statement should have been proved, and that it was not the place of the court to infer it.²

The furnishing of a certificate, as required by the condition of a policy of insurance, of three respectable persons, that they believed that the loss has not occurred by fraud, is a condition precedent, without compliance with which the assured cannot recover.³

In a Quebec case, where bad faith was alleged but not proved, the court decided, that over-valuation did not vitiate the policy, and judgment was rendered for such sum as appeared to be supported by the evidence.⁴

In order to successfully resist a claim on account of overvaluation, the latter must be designed with a view to obtaining a larger sum than the actual amount of loss.⁵

It has, however, been decided that, where a party insured claims to have lost by fire more than double the amount subsequently ascertained by his and the company's valutors to be the true amount of the loss, the claim will be held to be fraudulent in the absence of clear evidence to the contrary, and the reference to valutors (without waiver of the conditions of the policy) will not deprive the company of the benefit of the condition, that all claims under the policy shall be forfeited in the case of fraud in the claim or of false swearing by the assured.⁶

Where in a fire insurance policy separate amounts were placed on buildings and contents, and the assured, to induce the company to pay her claim, falsely and fraudulently stated in the statutory declaration, that she had suffered loss on the contents to the extent

¹ Supreme Court of Canada, North British & Mercantile Ins. Co. & Tourville *et al.*, 25 S.C.R. 177, referred to *supra* § 289.

² Reddick v. Saugeen Mut. Fire Ins. Co., 14 O.R. 506, 15 A.R. 363. Mason v. Agricultural Ins. Co., 18 C.P. 19, followed.

³ Racine v. Equitable Ins. Co. of London, 6 L.C.J. 89.—See also *supra* § 372.

⁴ Pacaud v. Queen Ins. Co., 21 L. C. J. 111. But see *infra*, Laroque v. Royal Ins. Co., 23 L. C. J. 217.

⁵ Park v. Phoenix Ins. Co., 19 U. C. Q. B. 117.

Laroque v. Royal Ins. Co., 23 L.C.J. 217, referred to *supra*.

of \$1,665.50, whereas the contents were proved to be worth \$150 only, the court decided, that the mis-statement vitiated not merely the claim in respect to the particular property as to which it was made, but the entire claim.¹

In another action, the company pleaded fraud in the statement by the claimant in this, that he affirmed that his loss by the fire was \$2,129.77, whereas, in fact, it was \$372.85 only, and further, that the fire occurred by the procurement and connivance of the assured, and that the policy was obtained by fraudulent misrepresentation as to the cash value of the stock. The court found in favour of the company on the ground of fraudulent and gross overvaluation both in the application and in the proofs of loss, and dismissed the action.²

In *Wiggins v. Queen Ins. Co.*³ the court said :—"The verdict of the jury estimating the loss at \$900 altogether puts aside the objection of fraud and fraudulent estimation, which is so clearly within the province of the jury, that the appellant is entitled unhesitatingly to all its advantage."

In an action to recover from the defendant a sum of money paid him in settlement of a loss by fire on a stock of goods, by reason, as was urged, of a misrepresentation as to the value of such stock, at a date prior to the fire, it was alleged that defendant had falsely and fraudulently represented his net loss to be the amount so paid, whereby the plaintiffs were induced to pay the same; and that defendant falsely and fraudulently represented that, at the date prior to the fire, his stock on hand was of a certain value, whereas it was of much less value, and that it was on the basis of such value, that the calculation was made as to the amount of such net loss, plaintiff also setting up the statutory condition whereby, as alleged, the claim was vitiated for fraud and false swearing as to the amount of the loss. The court held, on the issue as raised, that plaintiffs must fail, for the issue was as to the amount of the net loss, which the evidence showed had been misrepresented; and also, that there could be no recovery on the record as framed, for plaintiffs, having accepted a surrender of the policy, they had not offered to, and possibly could not, place defendant in his original position; that no amendment would avail, for to maintain an action of deceit, not only must there be misrepresentation, but it must be

¹ *Harris v. Waterloo Mut. F. Ins. Co.*, 10 O.R. 718. See also 13 L.N. 263.

² *Seghetti v. Queen Ins. Co.*, 10 L.C.J. 243. ³ 13 L.C.J. 151.

to the damage of the plaintiffs, which the evidence failed to show ; that the statutory conditions could hardly be invoked, for no proofs of loss had been required ; but, even if invoked, they would afford no defence, as there was no misrepresentation as to the amount of loss. It was also held, that the misrepresentation, even as urged, was immaterial, for it being as to the value of the stock at the named date, the fact of its causing an erroneous calculation upon which the amount of loss was based, would make no difference, so long as it was shown that the loss itself was within the true amount ; and also, the plaintiffs were estopped from setting it up, as the evidence showed that they did not rely upon it, but on the knowledge acquired, and independent information obtained, by the plaintiff's agent in the course of his investigation. *Semble*, that on the evidence there was no misrepresentation at all.¹

In a very recent Quebec case,² it appeared, that the plaintiff held a fire policy in the defendant company for \$5000, made up as follows : \$4000 on general household furniture, \$500 on a piano, and \$500 on liquors and cigars.

On the night of February 25th, 1894, the building containing the effects insured, and which was known as the "Club de Mille Fleurs," was destroyed by fire, and on March 10th following, plaintiff filed her claim for indemnity, in which she summarized her loss making a total of \$7180.35.

This claim was sworn to by plaintiff, and on April 9th, she supplemented it by a second one, by which she located in the various rooms of the house each piece of furniture mentioned in this list, and she added to this second statement a list of the various articles of wearing apparel which she said had been destroyed by fire, together with a valuation put upon each article, the whole amounting to \$566, and she testified to the correctness of this statement by a solemn declaration.

The company, not being satisfied that this was an honest claim, objected to pay, and the present action was taken, by which plaintiff claimed the full amount of the insurance, namely, \$5000, and after alleging the contestation, the Superior Court at Montreal awarded her the sum of \$4500. From this judgment the company appealed.

¹ Royal Ins. Co. v. Byers, 9 O.R. 120. C.P.D.

² Dame Elizabeth Bernard *et vir.* v. National Assurance Co. of Ireland ; Court of vie w, Montreal, 30th June, 1897, not yet reported.

By the first plea, the company set up the conditions of the policy relating to the making of a claim for loss thereunder, the date and nature of the claims made, and alleged that the plaintiff did not suffer loss to the extent of \$7180.35, as claimed; that the goods mentioned in the claim papers were not of the value therein stated; were not her property and were not in the premises destroyed at the time of the fire; and that her demand was exorbitant, false and fraudulent, and that the statements contained in these solemn declarations and in the accounts and schedules attached thereto, were false and untrue, and by reason of the conditions of the policy her claim had been vitiated, and she forfeited all rights which she may have had under the policy of assurance. The company also filed a general denial.

The condition pleaded stated in effect, that "any fraud or false statement on the said claim, or an account in relation thereto, shall vitiate the claim."

The appellant contended that there was fraud proved within the meaning of the policy, and that, even accepting the finding of fact in regard to valuation, which, they submitted, was too favorable for the plaintiff, the action ought, nevertheless, to have been dismissed.

Evidence was produced on both sides regarding the actual value of the liquors and cigars, and although the court considered certain explanations by witnesses on behalf of the assured as "open to grave suspicion" and "contradicted in several particulars," the proof was not held sufficient to convict the plaintiff of fraud in making the claim. Continuing, the court said:—

"Now, the piano was insured for \$500, but \$700 is claimed. This seems strange, for \$500 was presumably its value in November, 1893, when it was insured. It was sold in January, 1888, as a second-hand piano for \$360, payable by instalments, and the last instalment of \$60 was only paid after the fire. One would hardly think that a piano sold in January, 1888, for \$360 would be worth more than that sum in 1893, and yet there are several witnesses who seem to think plaintiff made a great bargain in getting this Steinway square at that price, and consider it worth \$500. Recorder de Montigny is amongst those who put its value at \$500. Plaintiff may have exaggerated the value in putting it at \$700. She could only get \$500 in any case, and has only been allowed \$300, which is a reasonable sum. The proof leads me to the con-

viction that the value of the furniture destroyed was close to \$4000, and if we add the value of the linen and wearing apparel, I certainly think \$4000 is a reasonable estimate of loss. It is true that there appears to be some exaggeration as regards certain items in connection with wearing apparel and with vegetables, but we cannot reject the entire claim because these items look exaggerated. We should think that there was a loss to the extent allowed by the judgment under review, viz: \$4500. As to the ownership of the property, we think the defendants have failed to make a good defence on this ground, and that plaintiff has fully shown her right to recover as owner.

379. Recent American decisions.—The subject matter of the present chapter has been fully considered in some recent actions instituted in the United States. It is quite evident from a careful examination of these cases, that the courts have been reluctant to accede to a request for forfeiture of claim on the ground of alleged false swearing and attempted fraud, unless the offence had without doubt been committed knowingly and wilfully, and concerning a material fact. In this they have merely followed the principle adopted by the courts in general: that a policy of insurance will not be cancelled unless its conditions have been broken with intent to defraud, or on a point which was either essential in itself or which was made a vital part of the agreement by the terms of the contract.¹

¹ *Forehand v. Niagara Ins. Co.*, 58 Ill. App. 161: false swearing to work forfeiture must be material.—*Linscott v. Orient Ins. Co.*, 34 Atl. Rep. (1896), 405: false swearing consists in knowingly and intentionally stating upon oath what is not true. A false statement, intentionally and knowingly or fraudulently made, constitutes fraud, and the statement of a fact as true, which a party does not know to be true, and which he has no reasonable ground for believing to be true, is fraudulent. The company having complained of the terms "fraud and false swearing" being used conjunctively, and contending that the court should have discriminated between them, it was held, that it was immaterial which expression was used by the court, the significance of each being the same, when taken in connection with the issue before the jury and the subject-matter to which they related.—In *Feibelman v. Manch. F. Ass. Co.*, 19 So. Rep. 540 (1896): a false representation in a sworn statement, that a license to retail liquors had been renewed, constituted no defence, there being no averment in the plea of any relation between the license and the insurance.—*Longcor v. Merch. Ins. Co.*, 19 N. J. L. J. 152 (1896): the fact of the insured concealing in his affidavit an encumbrance by mortgage, was held not to be "false swearing" within the meaning of the policy.—But in *Davis v. Grand Rapids F. Ins. Co.*, 36 N. Y. Suppl. 792 (1896), it was said, that where proofs of loss state that the property belonged to the assured, and that no other person had any interest therein, they state in effect that there was no encumbrance on it.—*Metzger v. Manch. F. Ass. Co.*, 63 N. W. Rep. (1896), 650: false statements to an adjuster by assured's

husband, who had exclusive control of his wife's business and was her agent in adjusting the loss, with intent to deceive the company, will not defeat a recovery on the policy, unless made with the knowledge and complicity of the assured. (Grant, J., dissenting). In this case it was also said, that the term "legal representative" referred to one who succeeds to the legal rights of the assured by reason of his death or the transfer of the policy, and not to a mere agent of the insured.

See also *Lion F. Ins. Co. v. Starr* (1888), 71 Tex. 733: "the attempt at fraud, to cause forfeiture of claim, must have been wilful and not the result of inadvertence or mistake."—*Merrill v. Ins. Co. of N. A.* (1885), 23 Fed. Rep. 245: "a false statement, to defeat recovery, must be false to the knowledge of the assured, and made for the purpose of defrauding the insurer."

Stone v. Hawkeye Ins. Co. (1886), 68 Iowa 737: "an over-estimate, which was made honestly and in good faith, clearly would not have the effect to exclude the claimant from all benefits under the policy."—*Behrens v. Germania F. Ins. Co.* (1884), 64 Iowa 19: "a mere overvaluation in the application for insurance will not defeat a recovery in the absence of affirmative showing of fraud."

In *Lewis v. Council Bluffs Ins. Co.* (1884), 63 Iowa 183, the court decided, that the assured's demand of the whole amount of the policy, claiming under oath that they were entitled to it, although the policy stipulated that loss, if any, was payable to the mortgagees, as their interest might appear, was an attempt at fraud, avoiding the policy, notwithstanding the fact that the original assured was required to make proofs of loss.

A case in which the Supreme Court of California took occasion to very carefully sift the question of false swearing in proofs of loss, was *West Coast Lumber Co. v. State Investment and Ins. Co.* (1893), 33 Pac. Rep. 258. It appeared from the evidence, that the company, with notice that the assured had parted with his interest, insisted upon his making the proofs; the loss was adjusted and the agent authorised to make a draft for the amount of the loss to the order of the person to whom, by the terms of the policy, it was payable. Under these circumstances, it was held, that the company could not afterwards avoid liability by claiming that the assured swore falsely as to the ownership of the property. The court cited *Lion F. Ins. Co. v. Starr*, *supra*, and continuing said, that the statement complained of must be knowingly and wilfully false, and intended to injure the company (*Erman v. Ins. Co.*, 35 La. Ann. 1005), or if not so intended, must relate to some matter concerning which the company has a right to know the truth, and the effect of which would have a bearing upon its liability, (*Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81; s. c. 3 S. Ct. Rep. 507, *infra*). The court also cited: *Silverberg v. Ins. Co.*, 67 Cal. 36; s. c. 7 Pac. Rep. 38. *Murray v. Association*, 90 Cal. 402; s. c. 18 Pac. Rep. 758. *Stache v. Ins. Co.*, 49 Wis. 89; s. c. 5 N. W. Rep. 36. *Smith v. Ins. Co.*, 62 N. Y. 85. A strong point in favour of the plaintiff in the case in question was the fact of the loss having been adjusted, and in this connection the court quoted what was said in the case last cited, viz: that "the time for investigation, as to breaches of warranty, is when a claim is made of payment; and if the company elects to pay the claim, or, what is equivalent, to adjust it by an independent contract, it cannot afterwards, in the absence of fraud, retract or fall back upon an alleged breach of warranty."

In the case of *Virginia F. & Mar. Ins. Co. v. Vaughan* (1892), 83 Va. 832, the undisputed facts were, that the assured in his preliminary proofs swore to an amount in excess of the actual loss, and furnished false vouchers, for which no explanation was offered. The Court of Appeals said: "We must, therefore, infer, that his sworn statements were known to him to be false, and, being upon a material matter, the law presumes that they were made with intent to deceive." This being the case, there could be no recovery. In rendering judgment, the court said, *inter alia*: "An authority in point is *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, (referred to *supra*). In that case, the policy sued on, like the policy in the present case, contained a provision to the effect that, in a case of loss, the assured should

submit to an examination under oath by an agent of the insurer, and that all fraud or attempt at fraud, by false swearing or otherwise, should avoid the policy. The assured, after loss, submitted to such examination and gave false answers as to the manner in which he paid for the goods. The answers, however, were made, not for the purpose of deceiving or defrauding the insurer, but for the purpose of showing the affiant consistent with a previous statement he had made on the same subject to a commercial agency, with a view of enhancing his credit in other cities. Nor was it claimed, that his actual loss was not correctly stated. The plaintiff, therefore, contended that the answers, though false, constituted no bar to a recovery. But the circuit court held otherwise and charged the jury that, if the answers were intended to influence the action of the insurer and were false, then there was a false swearing within the meaning of the policy, which avoided it, although there may have been no intention to defraud. In affirming this ruling the Supreme Court said: "A false answer as to any matter of fact material to the inquiry, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected, if it failed, it would be a fraud attempted. And if the matter were material, and the statement false to the knowledge of the party making it, and wilfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts."

CHAPTER XIX.

ARBITRATION.

380. GENERAL REMARKS — LEGISLATIVE ENACTMENTS AND JURISPRUDENCE ON ARBITRATION.

381. WHERE ARBITRATION IS HELD

A CONDITION PRECEDENT AND WHERE IT IS NOT—WAIVER OF ARBITRATION.

382. POWERS AND DUTIES OF APPRAISERS—COST OF APPRAISEMENT.

380. Legislative enactments and jurisprudence on arbitration.—Under statutory conditions in Ontario,¹ Manitoba² and British Columbia,³ if any difference arises as to the value of the property insured, of the property saved, or of the amount of the loss, the same shall, whether the right to recover on the policy is disputed or not, and independently of all other questions, be submitted to arbitration. There is no such statutory enactment in Quebec.

Under the common law, the courts have not hitherto favored an attempt to oust them from their jurisdiction and to substitute a tribunal, erected by the parties, for the tribunal which public policy and the general laws have established and clothed with the requisite powers to make them the efficient and, upon the whole, the best means of hearing and determining controversies between individuals.

While, however, it is perfectly well settled that, under the common law, any agreement that contemplates the exclusion of an aggrieved party from a suit of law is invalid, there seems to be no doubt that any agreement as to the mode of adjustment or of settling the amount of loss, or the time for paying it, or any particulars of that nature, which do not go to the root of the action, but are preliminary thereto, or in aid thereof, as, for instance, an agreement that at the trial of an action it shall not be lawful for either party to enter into the question of the amount of the loss, but that it shall always be settled by reference, and that the only

¹ 60 Vic., c. 36 (O), s. 168, stat. con. 16. ² R. S. M. 1891, c. 59, stat. con. 16.

³ B. C. Ins. Policy Act, 1893, stat. con. 16.

question to be tried at law shall be the right to recover, is perfectly valid and legally binding.¹

In the Quebec case of *Peters v. Quebec Harbor Com'rs*,² it was said that a clause, referring matters in dispute under a contract to arbitration, was null and did not bind the parties; but the Supreme Court of Canada modified this decision.³

From the time of the earliest English leading cases⁴ down to the latest decisions, it has been found by the courts most difficult to reconcile and give effect to two propositions so nearly in direct opposition, as that no contract of the parties shall oust the jurisdiction of the courts, and that, on any difference arising between the two parties, it shall be referred to arbitration. But the fair result of the authorities is, that if the contract is in such terms that a reference to a third person or to a board of directors is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition is complied with; but if, on the other hand, the contract is to pay for the loss, or other matter in question, with a subsequent contract to refer the matter to arbitration contained in a distinct clause collateral to the other, then that contract for reference shall not oust the jurisdiction of the courts or deprive the party of his action.⁵

Regarding the rule, that the jurisdiction of the courts should

¹ *Scott v. Phoenix Ass. Co.*, Privy Council, *Stuarts L. C. Rep.* 354.—*Racine v. Equitable*, 6 L.C.J. 80.—*Anchor Marine Ins. Co. & Allen*, 13 Q.L.R. 4.—*Merchants Marine & Ross*, 1 Q.L.R. 233.—*Porter's Laws of Ins.* 201.—*Nat. Mas. Acc. Ass'n v. Burr* (1895), 24 Ins. L. J. 423.—*May*, 492 *et seq.*

In *Smith v. Preferred Mas. Mut. Acc. Ass.* (1892), 51 Fed. Rep. 520, the arbitration clause was construed to refer only the question of amount of damage to arbitration, and it was held, that it was no condition precedent, and could not be pleaded in bar or abatement in a suit on the certificate. See also *infra*.

There can be no arbitration where the loss is total, as in *Rosenwald v. Phoenix Ins. Co.* (1888), 50 Hun. 172.

² 15 Q.L.R. 277, and see 411 & 1431 *et seq.*, C.P., and *Scott v. Phoenix S. R.* 152, *supra*.

³ 19 S.C.R. 685, & see *Quebec St. Ry. Co. & Corporation of Quebec*, 13 Q.L.R. 205.

It was said in *Whitney v. Nat. Mas. Acc. Ass.* (1893), 54 N. W. Rep. 184, that a contract of accident insurance creating a definite legal obligation—for instance, to pay a certain sum of money as indemnity for loss of time by reason of disability to follow business resulting from the accident—an agreement to the effect that the rights and obligations of the insurer and insured shall be determined by arbitration and that no action shall be maintained on the contract, is not legally effectual to bar such an action.

⁴ *Kill v. Hollister*, 1 Wilson 129.—*Thompson v. Charnock*, 8 T.R. 138.—*Goldstone v. Osborne*, 2 C. & P. 550.—*Street v. Rigby*, 6 Ves. 815.—*Scott v. Avery*, 8 Exch. 487.—*Elliott v. Royal Ex. Ass. Co.*, 2 Exch. Cas. 237. ⁵ *May*, 494.

not be ousted, Coleridge, J., said in *Scott v. Avery*,¹ a case which has been the subject of much comment and many explanations:—
 “I certainly am not disposed to extend the operation of a rule, which appears to me to have been founded on very narrow grounds, directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals.”

Where in an action upon fire insurance policies the questions in issue between the parties were not confined to matters of mere account, but the defendants disputed their liability, and issues of fraud, misrepresentation and concealment of facts were raised upon the pleadings, the court was of opinion that an order, referring all the issues in the action to a referee for enquiry and report, was improperly made, and that the plaintiff was entitled to have a trial in the ordinary way.²

381. Where arbitration is held a condition precedent and where it is not—Waiver of arbitration.—In *Elliott v. Royal Exchange Ass. Co.*,³ the company pleaded, that the assured had not submitted the matter in dispute to arbitration, as provided by the policy, and the court held, on demurrer (Bramwell, J., dissenting, *infra*), “that the covenant was only a covenant to pay the adjusted loss and that the plaintiff had no cause of action.”

And in *Caledonian Ins. Co. v. Gilmour*,⁴ also, “an award as to damage,” as required by the terms of the policy, was declared to be “a condition precedent to bringing the action.”

Bramwell, J., in *Elliott v. Royal Exchange*, *supra*, said:—“If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But, if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if “something else” happens, and that “something else” is that a third person shall settle the amount,—then, no cause of action arises until the third person has so assessed the sum.”

It has been held in Ontario, that an agreement to fix the amount of loss by arbitration is not a condition precedent to suit,

¹ 5 H.L.C. 811. Porter's Laws of Ins. 201.

² *Clarry v. British Am. Ass. Co.*, 12 P.R. 357, Chy. D.

³ 2 Ex. 237. ⁴ H.L. (S.), 1893, A.C. 85.

unless expressly so stipulated,¹ that is, when the assured has suffered loss and commences an action against the company, the company cannot have the action stayed until the loss has been settled by arbitration.

Where the policy provided, that no action should be sustainable until an award had been obtained from arbitrators at the request of either party, fixing the amount of the claim, the court decided that, in the absence of a request by the company, the submission to arbitration was not a condition precedent to plaintiff's right of action.²

The condition, by which the defendants in *McIntyre v. Nat. Ins. Co.*³ sought to defeat the action, provided that all disputes touching loss or damage should, after proof thereof, be submitted to arbitrators to determine the amount, but not the liability, and that an action against the company should not be sustainable until after an award had been obtained fixing the amount, or unless such action should be commenced within twelve months after the loss; and the defendants covenanted, in the body of the policy, to pay the loss within sixty days after the loss had been ascertained and proved in accordance with the terms of the policy. It appeared that the assured had furnished the defendants with proof of the loss on the 5th April, to which the defendants made no objection until the 11th June following, when they served a written request for an arbitration upon the assured, who refused to arbitrate, and the plaintiff, to whom the claim was assigned, brought this action :—

The court decided, that even if the condition was available as a defence, it had not been broken, as, in the absence of a request to arbitrate within the sixty days, the loss must be considered as “ascertained and proved” and the plaintiff, therefore, had a right of action on the expiration of that period.

The courts in the United States have frequently been appealed to in order to determine whether arbitration is, or is not, a condition precedent, or whether the right to demand an arbitration has been affected, and how far, by acts of either of the contracting parties. The American decisions, which have evidently been

¹ *Hughes v. London Ass. Co.*, 4 O.R. 293 Q.B.D., affirming the order of Armour, J., reversing the order of the Master in Chambers. See also *Ulrich v. National Ins. Co.*, 4 A.R. 84, and *Montmagny Mut. Ins. Co. & Carbonneau*, 16 R.L. 275, *infra*.

² *Bishop v. Norwich Union Fire Ins. Society*, 25 Nova Scotia Law Reports 492; & see *Montmagny Mut. Ins. Co. & Carbonneau*, 16 R.L. 275, *supra*.

³ 5 A.R. 580.

arrived at after mature deliberation and due consideration of all the circumstances bearing upon the question, discuss some points which do not appear, so far, to have been raised in Canadian courts, and a reference to them may, therefore, prove of interest in dealing with the subject matter of this chapter.¹

¹ The question of the award under a submission to arbitration under various provisions of policies of fire insurance being a condition precedent to a right of action upon the policy, and the effect of a refusal on the part of assured to assent to a proposed submission, has been considered by the Supreme Court of the United States in *Hamilton v. Home Ins. Co.* (1887), 137 U. S. 370, with the result that is embraced in the following declared rules in such cases: "A provision in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides, that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton v. Liverpool & London & Globe Ins. Co.*, 136 U.S. 242, and in many cases therein referred to, the award is a condition precedent to the right of action. But, when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent, and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. *Roper v. London*, 1 El. & El. 825; *Collins v. Locke*, 4 App. Cas. 674; *Dawson v. Fitzgerald*, 1 Ex. D. 257; *Reed v. Washington Ins. Co.*, 138 Mass. 572; *Seward v. Rochester*, 109 N.Y. 164; *Birmingham Ins. Co. v. Pulver*, 126 Ill. 329, 338; *Crossley v. Connecticut Ins. Co.*, 27 Fed. Rep. 30. The rule of law upon the subject was well stated in *Dawson v. Fitzgerald*, by Sir George Jessel, Master of the Rolls, who said: "There are two cases where such a plea as the present, is successful; first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases, where there is a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant "to bring an action for not referring" or (under a modern English statute) "to stay the action till there has been an arbitration." 1 Ex. D. 290. Applying this test, it is quite clear, that the separate and independent provision in the policy now before us, for submitting to arbitration the amount of the loss, is a distinct and collateral agreement and was wrongly held by the Circuit Court to bar this action."

A provision that no suit or action against the insurer "shall be sustained in any court of law or chancery until after an award shall have been obtained" by arbitration, "fixing the amount" due after loss, was declared void in *German-Amer. Ins. Co. v. Etherton* (1889), 25 Neb. 505, the effect of such provision being to oust the courts of their legitimate jurisdiction.

But in *Hamilton v. L'pl & L'don & Globe Ins. Co.* (1890), 136 U.S. 242, *supra*, an appraisal, when requested by either party, was held a condition precedent. In this case, the assured refused to submit to arbitration, unless the insured would consent in advance to define the legal powers and duties of the appraisers, which the insurer was under no obligation to do, and the assured also sold the property before the completion of an award. Under these circumstances, the action was declared not maintainable.

In *Davis v. Anchor Mut. F. Ins. Co.*, 6 N. W. Rep. 687 (1895), where the policy provided that differences as to the amount of loss should, at the "written request of either party," be submitted to arbitration, and that no action should be brought

until after the award, arbitration, in the absence of a request therefor, was not a condition precedent to an action.—And see *Lawrence et al. v. Niagara Fire Ins. Co.*, 37 N. Y. Suppl. 811 (1896), 2 App. Div. 267; but see *contra Probst v. Am. Cen. Ins. Co.*, 2 Miss. App. Rep. 1280 (1896).

In *Milw. Mech. Ins. Co. v. Stewart et al.*, 42 N. E. Rep. 290 (1895), where negotiations as to the amount of loss had taken place and the company refused to pay until further proofs were furnished, but did not offer to submit the loss to arbitration, a suit brought four months thereafter was not a violation of the condition as to arbitration.—And a similar decision was rendered in *Sands v. Dwg-House Ins. Co.*, 28 Pittsburgh Leg. Journal 318 (1896), where the company denied both its liability and the amount of loss.—See also *Union Ins. Co. of Cal. v. Barwick* (1893), 54 N. W. Rep. 519, for waiver of arbitration by denying liability.

Where a policy of fire insurance provides that, in case of loss and a failure of parties to agree on the amount thereof, appraisers shall be chosen, the company can not demand appraisal and, at the same time, deny its liability under the policy. This was the opinion of the court expressed in *Hickerson et al. v. German-Am. Ins. Co.*, *Do. v. Royal Ins. Co.*, *Do. v. Equitable Ins. Co.*, 25 Ins. L. J. 422 (1896).

An insurance company, by denying its liability on the ground of a forfeiture of the policy by reason of a breach of warranty by the insured, waives whatever right it may have had to insist upon arbitration as a means of determining the amount of the plaintiff's damage. *Vide Home Fire Ins. Co. v. Kennedy*, 66 N. W. Rep. 278 (1896).

Failure of the company, after demanding an appraisement of a fire loss at a given time and place, to appear at the time or place designated by agent or otherwise, without the intervention of any act of the insured, was held a waiver of its right to appraisement in *Northern Ass. Co. v. Samuels et al.*, 33 S. W. Rep. 239 (1896).—And failure of a company to pay any attention to a request for arbitration duly made, will be construed a waiver. This was the decision rendered in *McDowell v. Ætna Ins. Co.*; *Same v. Royal Ins. Co.*; *Same v. Phoenix Ins. Co.*, 41 N. E. Rep. (1895), 665.

A clause in an accident policy, providing for arbitration before action, is waived where the company, after receiving a demand for the money, and a threat of action therefor, made no request for arbitration, and expressed its willingness to test the matter in the courts :—*Grau v. Masons Fraternal Acc. Ass. of Am.*, 3 Detroit Legal News 195; 67 N. E. Rep. 546 (1896).

In *Manch. F. Ins. Co. v. Simmons*, 35 S. W. Rep. 722 (1896), the court was of opinion, that where a policy of insurance provides that the estimate of the loss incurred by the insured shall be made by the insured and the company, or, if they disagree, by appraisers, the ascertainment of the amount of loss by the appraisers is not a condition precedent to a recovery on the policy, except in case of actual disagreement; and the company cannot, by declining or neglecting to take any action after proof of loss, urge as a bar to an action for recovery under the policy, that the amount of loss has not been agreed upon or fixed by appraisers.

In *Ætna Ins. Co. v. McLead et al.*, 25 Ins. L. J. 609 (1896), it was decided, that a clause providing for "arbitrators mutually chosen, whose award in writing shall be binding on the parties," is inoperative, when no arbitrators are agreed upon, and is too indefinite to make arbitration a condition precedent.

In the absence of any disagreement as to the amount of loss or request for submission to appraisers, the company cannot plead failure of such submission, as said in *Moyer v. Sun Ins. Office*, 35 Atl. Rep. 221 (1896), *supra* § 370, p. 610, n. 3, and § 372, p. 615, note.

In *Keefe v. Nat. Acc. Soc.*, 38 N. Y. Suppl. 854; 4 App. Div. 392 (1896), it was held, that a provision, that the insured shall submit to arbitration any differences that may arise as to his rights under it, is void as ousting the courts of jurisdiction.

The Supreme Court of Cal. held in *Case v. Manuf. F. & M. Ins. Co.* (1890), 82 Cal. 263, that no right of arbitration exists under a fire insurance policy when the stipulation for arbitration does not definitely fix the number of arbitrators, nor provide a

In *Smith v. City of London Ins. Co.*,¹ the company, after action, under the 16th statutory condition, demanded an arbitration as to the value of the premises destroyed, the result of which was an award finding the value to have been \$2500, and the loss payable to the plaintiff \$1700, while the jury at the trial of the action found that the plaintiff had truly represented the property as having been worth \$3500, and estimated his loss at that amount:—

The court declared that, there having been no misrepresentation on the plaintiff's part, no mutual mistake, and the defendants not having proved that they granted the policy in consequence of any mistake on their part, the parties were *ad idem*, and the plaintiff was entitled to judgment for the amount of the award.

Where the plaintiffs had insured their ship with the defendants and, a loss having occurred, the matter was submitted to arbitrators and *amiables compositeurs* appointed, the defendants contended that the following clause: "It is expressly understood that this appraisalment is for the purpose of ascertaining and fixing the amount of said loss and damage only, to the property hereafter described, and shall not determine any other right or rights

mode of selection; and arbitration is not a condition precedent, unless demanded within a reasonable time and before right of action has become complete by the lapse of the time prescribed in the policy.

In *Vangindertaelen v. Phoenix Ins. Co. of Brooklyn* (1892), 82 Wis. 112, it was held, that an action commenced three months after proofs had been received without objection and no suggestion of arbitration was made, could not be defeated on the ground that there had been no arbitration as provided for by the policy. The court said: "The arbitration was only provided for in case the parties failed to agree. In case they disagreed, and the amount of loss was submitted to arbitrators, then the same was not to be payable until determined by their award, even though it should not be made until weeks, or even months, after the expiration of the sixty days; and the provision, making such award a condition precedent to the commencement of a suit upon the policy, presupposes such failure to agree and consequent arbitration. This is but another application of the rule requiring a strict construction to prevent a forfeiture.

Where there is no difference as to the amount of loss and neither party requests an appraisalment or arbitration, as appeared to be the case in *Capitol Ins. Co. v. Wallace* (1892), 48 Kan. 400, it is not necessary that there should be any appraisalment or arbitration, before the assured has the right to commence an action.

In *Whitney v. Nat. Mas. Acc. Ass'n of Des Moines* (1893), 54 N. W. Rep. 184, the court said, that an agreement to the effect that the rights and obligations of the parties shall be determined by arbitration and that no action shall be maintained on the contract, is not legally effectual to bar such an action.

Where the company, after being furnished with proofs of loss, made no effort to agree with the insured on the amount of loss, but demanded appraisers, the insured might commence an action on the policy without such appraisalment or arbitration.

See *Boyle et al. v. Hamburg-Bremen Fire Ins. Co.*, 24 Ins. L. J. 699 (1895).

¹ 14 A. R. 328.—See S. C. 11 O. R. 38.

of either party to this agreement," had not the effect of relieving the plaintiffs from any of the conditions of the policy. It was decided that, whatever the effect of the clause quoted, the fact that the defendants submitted the matter to arbitration was an admission that the fire had taken place and that a loss had been suffered by the plaintiffs, and that this admission supplied the notice and proof of loss called for by the conditions of the policy.¹

After an action had been commenced on a policy of insurance, the defendants gave notice of arbitration under the statutory condition, when the court made an order that, on the defendants abandoning all defences and admitting their liability under the policy sued on, all proceedings in the action should be stayed, the plaintiff to sign final judgment and proceed in the action for the amount which might be awarded him, together with the costs of the action, etc. And it was further ordered, without the consent of the defendants, that either party, after the making of the award, might apply to a judge in chambers in respect of the payment of the costs of the reference and award. The arbitrators awarded to the plaintiff the full amount of his claim. On application to Rose, J.,² an order was made directing the defendants to pay the costs of the reference and award. On appeal to the Divisional Court, Cameron, C. J., was of opinion, that the appeal should be allowed, there being no jurisdiction over the costs on such a reference; and Galt, J., that it should be dismissed. The court being equally divided, the judgment was affirmed.³

¹ Rich. & Ont. Navig'n Co. v. Comm. Union Ass. Co., R. J. Q., 3 Q. B. 410.

² 7 O. R. 465. ³ Hughes v. Hand in Hand Ins. Co., 7 O. R. 615, C. P. D.

In *Johnson v. Amer. Ins. Co.* (1889), 41 Minn. 396, an arbitration requested by the company pursuant to the contract, solely as to the amount of loss, but not to decide the liability of the insurer, was held not to debar the latter from thereafter bringing in question the legal effect or validity of the alleged contract, the court adding:—"Considerations of expediency might well prompt the parties to agree upon a speedy examination and appraisal by arbitrators as to the amount of the loss, merely, at a time and under circumstances which might be most favorable for such purposes, without waiting until a determination could be secured as to the legal rights and obligations of the parties under the contract."

In *Caledonian Ins. Co. v. Traub et al.*, 25 Ins. L. J. 791 (1896), it was decided that, where one of two appraisers ceased to act, and the appraisal was completed by the other appraiser and the umpire, the award was not in accordance with the policy. But the mere fact, that the umpire was chosen after the appraisal was begun, did not invalidate the award. It was also held in this case, that the assured cannot maintain an action if he causes a failure of appraisal; and, further, that in an action on the policy, the appraisal cannot be proved by oral evidence, unless the absence of the paper is accounted for.

382. Powers and duties of appraisers—Costs of appraisal.—Where a church was insured under a three years' policy on November 14th, 1885, and was destroyed by fire May 31st, 1888, the evidence showed, that the insurance company admitted the loss, but required the damages to be proved, and a submission to appraisers was entered into by the parties, in which it was provided that "the award made by them (the appraisers) or any two of them, shall be binding upon both of said parties as to the amount of such damage to said insured property, but shall not determine any question touching the legal liability of said company," etc. Two of the appraisers joined in an award giving the insured the full amount claimed, and ordered the company to pay the costs of the reference and award. The company refused to pay any costs over and above half the arbitrators' fees:—The court held (affirming the Master in Chambers), that R. S. O. (1887), c. 167, s. 114, was applicable to the policy in question, and that the legislature intended by the use of the words, "or otherwise in force in Ontario with respect to any property therein," that section to be applicable to all policies existing at the time the Act came into force, and that costs were properly awarded under sub-section 16 of that section.¹

In *Heward v. Scottish Union & National Insurance Company*, the plaintiff claimed from defendant the sum of \$653.67, viz. \$500 for his fees as appraiser and valuator acting for the defendants in reference to a loss by fire sustained by the firm of Kearney Brothers in October, 1896, and \$153.67 for expenses incurred by plaintiff in connection with such services. The defendants tendered \$350 in full satisfaction of plaintiff's claim. The facts, as they appeared to the court, were that plaintiff was a wholesale tea merchant doing a large business in Montreal. He had first refused to act as defen-

The assured in *Sling v. Nat. Ass. Co. of Ireland* (1891), 7 Utah 441, was held not to be limited in his right of recovery by the award of appraisers, the instructions given the latter by the company's agent having been on too narrow a basis.

The award made by appraisers was set aside in *Bradshaw v. Agr. Ins. Co. of W'town* (1893), 137 N. Y. 137, on the ground that the appraiser selected by the company was not "disinterested."

A stipulation for arbitration, which does not provide for submitting the matters in dispute to a particular person or tribunal, but to one or more persons, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject of the controversy. *Vide* *Home F. Ins. Co. v. Kennedy*, 66 N. W. Rep. 273 (1896), *supra*.

¹ *Re St. Phillips Church, Weston, & Glasgow & London Ins. Co.*, 17 O. R. 95, and see *Anchor Marine Ins. Co. v. Corbett*, 9 S. C. R. 73.

dants' appraiser in the matter, but was persuaded to accept the office by a promise of being well paid for his services. The work extended from the 17th October until the 7th November. It appeared that plaintiff had discharged his duties faithfully and with great zeal for the party he represented. It was in his busiest season, and he had to neglect his own business to a considerable extent. According to the rate usually paid to merchants, acting as experts in the valuation of goods injured by fire, the sum of \$500 was not more than he was entitled to. It further appeared, that defendants had tendered plaintiff \$500 previous to the institution of the action in full satisfaction of his fees and expenses. The court was of opinion that this tender was insufficient, as plaintiff was entitled to his expenses in addition to the \$500, and judgment was, therefore, rendered in favor of the plaintiff for the amount demanded.¹

¹ Superior Court, Montreal, 15 May, 1897, not yet reported. See *infra* § 394.

In *Bangor Savings Bank v. Niagara F. Ins. Co.* (1892), 85 Me. 68, it was mutually agreed that the damage should be "ascertained and estimated" by competent and disinterested appraisers selected with special reference to their knowledge, skill and experience in regard to the subject matter. The court said :—" This duty is to be performed by the appraisers mainly by the aid of a personal examination of the premises and an application of their personal knowledge. They are not expected to hold a formal session of court to determine an entire controversy after hearing pleadings, evidence and argument. Their proceedings resemble more the process of taking expert testimony. Whether mere valuers or appraisers, thus appointed for such a purpose, can be deemed arbitrators in any proper sense or for any purpose, there is no occasion to decide. The authorities are not in harmony upon the subject. See *Morse on Arbitration*, 38, 42, and cases cited. It is not necessary to follow the different courts in their ingenious efforts to trace, for all cases, a line of distinction between a mere appraisalment and an ordinary submission to arbitration. The result may be that such appraisers are properly considered arbitrators for some purposes, but not in all respects. All are invested with *quasi* judicial functions, which must be discharged with absolute impartiality, without the improper interference of either part, or undue influence from any source. But appraisers may be said to act in the two-fold capacity of arbitrators and experts. In the character of experts, they not only give effect to opinion based directly on their personal experience and knowledge, but also opinions founded in some measure upon information which may not be so direct and original as to be competent in itself as primary evidence. A witness called as an expert is expected, before testifying, to refresh his memory and confirm his judgment by an examination of authorities and conference with other experts. The umpire did precisely this and no more in the case at bar. After making an examination of the premises and certain estimates of his own, he made enquiry of an experienced and disinterested painter respecting the cost of painting. His conclusions may have been affected and modified to some extent by the information thus obtained, but he declares that his report correctly represented his own judgment. He was not only unconscious of any impropriety in seeking this information, but was evidently engaged in a careful and conscientious effort to reach a just and correct appraisal. So far from being improper and illegal, his conduct was entirely praiseworthy. Any rule, which would prohibit an appraiser from thus qualifying

himself to do justice between the parties, so far from being an aid in the ascertainment of truth, would be an essential obstacle to it."

It was said in *Harrison v. German-Am. Fire Ins. Co.*, 67 Fed. Rep. 577 (1895), that a stipulation, that no agent shall be held to have waived any of the conditions of the policy, unless such waiver shall be endorsed thereon in writing, does not apply to conditions to be performed after the loss is incurred ; and, therefore, an adjuster can waive a provision making arbitration in accordance with the terms of the policy a condition precedent to suit, by making a different agreement for arbitration.

CHAPTER XX.

SUICIDE AND DEATH BY THE HANDS OF JUSTICE OR IN VIOLATION OF LAW.

383. JURISPRUDENCE ON SUICIDE IN GENERAL AND THE EFFECT OF RESTRICTING PROVISIONS IN THE POLICY.

384. DEATH BY THE HANDS OF JUSTICE OR IN VIOLATION OF LAW.

383. Jurisprudence on suicide in general and the effect of restricting provisions in the policy.—Insurance effected by a person on his own life is void if he die by the hands of justice, by duelling, or by suicide.¹

Upon the question of voluntary suicide,² intentionally committed by a sane man in the possession of his faculties, knowing how to adopt means to ends and conscious of the immorality of the act, there is not any difference of opinion, and all authorities agree that such a suicide is within the exemption and that the act voids the policy.

¹ C.C.L.C. 2593.—Ellis, 102, 3, n. 1, 195, n. 1; 4 Bligh R. 164, N.S. Bolland v. Disney; 2 Alau, 563; Ang. 289.

² An article which appeared in the Insurance & Finance Chronicle, vol. xvii, p. 118, under the heading of "The suicide question again," points out that self-destruction among insured in American companies has materially increased during the last few years, and that this is evidently to a great extent due to the fact that several of the most prominent companies have of late years extended their policy conditions in the direction of liberality by making them incontestable, excepting for failure to pay premiums as stipulated, after two years from date of issue, and that, consequently, suicide is a risk assumed by the insurer. The article goes on to show that, although it has been argued in good faith that men are not likely to insure with the preconceived design of deliberately terminating their own lives at the end of a two-year period, and that, hence, the risk is a merely nominal one; yet, experience would seem to prove the contrary to be true, for the records, so far as made known, show the period immediately following the first two years of the policy life to present a most decided increase in the percentage of self-destruction, as compared with other causes. Continuing, the article quoted says:—"We are all familiar with the old argument, which has so frequently formed the basis of court decisions, that no really sane person will commit suicide, and that the kind of insanity or mental aberration, which leads to the act, is really a disease, and, therefore, that the insuring company ought to be held liable, as in the case of other diseases which cause death. There is, however, abundant evidence which goes to show that both the views above expressed are erroneous." Pointing out that some companies endeavor to avoid this "real and increasingly grave danger" by agreeing in case of suicide to

And all the authorities likewise agree that an accidental death, as by taking poison by mistake, or shooting oneself with a pistol supposing it not to be loaded, or falling from a building, or death happening in any way by the unintended act of the party dying, is not within the exemption and does not void the policy.

But whether suicide by an insane man is also within the exemption, has been a question in dispute,¹ and upon this two prominent and different doctrines have been maintained.

On the one hand, it is maintained that, if the act be voluntarily done in pursuance of an intelligent purpose and intentionally and intelligently carried out by the proper adaptation of means to ends, it is suicide on the part of the insured or death by his own hands, although insanity exists to such an extent that he may not be able to appreciate the moral qualities of the act.

On the other hand, it is maintained with equal rigor that, however intelligently the act may be done, if at the time the will be overpowered by an uncontrollable impulse, or the insured be unable to appreciate the moral character of the act, it is not within the meaning of the provision.²

refund the gross premiums paid in, (*vide infra*, p. 650, note), while others agree to pay the accrued reserve on the policy, which seems to be just and reasonably liberal, the article says in conclusion:—"One of the reasons which have induced companies to treat suicide as incontestable under the two-years' limitation has been the numerous verdicts of juries and the decisions of courts which have pronounced self-destruction to be the act of an unsound and constructively diseased mind. Besides this, some states, notably Missouri, (*vide infra* p. 649), have enacted laws declaring that companies shall be held fully liable within their jurisdiction for suicide, whatever the form of the policy contract, and the courts have sustained the law. Like many other evils connected with life insurance, the evil here considered is apparent, but the best remedy is difficult to devise and apply. Perhaps the most feasible way out lies in an agreement to pay the beneficiary the reserve value of the policy as likely to disarm hostile legislation and appeal to the sense of justice supposed to control court decisions."

¹ The clause in a policy exempting the company from liability in case of suicide has been held by the Supreme Court of the United States, in *Acc. Ins. Co. v. Crandal* (1887) 120 U.S. 527; and *Breasted v. Farmers Loan & Trust Co.*, 4 Hill 73, not to apply to suicide while insane, if such a provision does not contain the words "sane or insane," the court repeating the words used by Mr. Justice Nelson, when Chief Justice of New York, said:—"Self-destruction by a fellow-being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used by him for the purpose, and was no more his act in the sense of the law than if he had been impelled by irresistible power."

² For the rule that the exception does not cover voluntary self-destruction where insured does not understand the moral aspect and character of the act, see an examination of the authorities in *Blackstone v. Standard Co.*, 74 Mich. 593 (1899).

Where a policy excepts suicide "sane or insane," the term includes all cases of self-destruction not accidental.¹

¹ See cases in Cooke on Life Ins. § 43.

The exception as to non-liability of a life assurance company in the event of the assured dying by his own hand, "sane or insane," has been discussed by the New York Court of Appeals in the case of *De Gogorza v. Knickerbocker Life Ins. Co.* (1875). 65 N. Y. 232. This case has been accepted as authority by the United States courts. When rendering judgment, Reynolds, C.J., for the court, said:—"It is now to be regarded as a settled law of this country and of England, that a clause in a policy of life insurance exempting the insurer from liability if the assured die by his own hand, has reference to an intelligent or voluntary act, and not a suicide committed by a party in a state of mental derangement, so great that the act of self-destruction is to be regarded as wholly involuntary. The question is, whether the addition of the words "sane or insane" is to be considered of any legal effect. In all cases heretofore considered by the courts, so far as we are advised, save and except those to be hereafter referred to, the words "sane or insane" were not written in the policy. Such were the leading English cases of *Borradaile v. Hunter* (5 M. & G. 639), *Clift v. Schwabe* (3 C. B. 437), and all the cases in this state and in some others of our sister states. And in all these cases it is to be observed that the courts considered that the words "dying by his own hand" could not have a literal application, for, if so, a voluntary death by drowning, or by taking poison, would not avoid the policy any more than a death occasioned by a pistol shot by the hand of a madman, moved by an irresistible insane impulse. But the exceptions, which the courts have engrafted upon the meaning of the words employed, rest upon the ground that the excepted cases could not have been within the meaning of the parties to the policy. It is, therefore, held that a death by drowning, or by poison, is a death by the hand of the assured, and also that a death from a pistol shot, delivered from the hand of the assured, is not a death by his own hand if at the time he was bereft of reason and the act was involuntary. We have, therefore, only to consider the interpretation to be given to the language of the contract of insurance, for no question is made but that it was fully understood and agreed to by both parties.

It can scarcely be doubted that an insurer of the life of a person may by apt language guard himself from liability for all disasters if the exemption does not contravene public policy. He may provide that, if the assured shall die of the small-pox, or any other specified disease of the body, he would not be liable, and there appears to be no reason why he may not guard himself against liability if death results from any disease of the mind. Indeed, it is said by *Rapallo, J.*, in *Vanzandt v. Mutual Benefit Life Ins. Co.* (55 N. Y. 169), that "no rational doubt can be entertained that a condition exempting the insurers from liability in case of the death of the assured by his own hand, whether sane or insane, would be valid if mutually agreed upon between the insurer and the insured," and he then, in substance, adds that, "if nothing is said with respect to insanity, the result is that a party does not 'die by his own hand,' if his death happens from the involuntary act of a madman." This is of the question is but a very concise and accurate statement of the law as announced in cases previously adjudged. No reason has been assigned and, we think, none can be, if a party insuring his life shall argue that in case his death shall result from the mental disease of insanity the insurers shall not be liable. The words "insane" or "insanity" ordinarily imply every degree of the unsoundness of mind, and in this case we assume that the assured was in the very last degree mad or insane, so that the mere act of self-destruction was wholly involuntary." The court then reviewed some of the leading cases and concluded as follows:—"We prefer to place our decision upon the ground that the words of the proviso in the policy before us, by plain rules of interpretation, exempt the insurer from liability. That this language, in view of the previous decisions, was inserted for a purpose

The question does not seem to have come before the courts in Canada, and when it arises it will have to be decided in the light of the jurisprudence of other countries.

The general doctrine in the United States is that, where performance by the insurer is conditioned on the death of the insured, death by suicide is included¹; but the law in Quebec is different.²

In accident policies containing a stipulation against "suicide," the recent decisions, as has been pointed out, limit the term to "sane suicide" and some companies add to the term "suicide" the words "sane or insane," thus excluding from the risk self-destruction under any circumstances.

cannot be doubted, and that it was agreed to by both the insured and the insurer is not questioned, and that it is a provision allowed by law no one denies. We are to say from these words what the parties must have intended, and we cannot properly say that additional words, having no meaning, were inserted in the contract, and if they mean anything, it is just what the words commonly import, and that is, if death ensues from any physical movement of the hand or body of the assured, proceeding from a partial or total eclipse of the mind, the insurer goes free."

In the opinion of the court in the case of *Bigelow v. Berkshire Life Ins. Co.*, 93 U.S. 284, it was said:—"The insurers have sought to avoid altogether the risk of suicide, 'sane or insane.' If they have succeeded in doing so, it is our duty to give effect to the contract, as neither the policy or the law, nor sound morals, forbid them to make it. If they are at liberty to stipulate against hazardous occupations, unhealthy climates, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely, it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. It is not perceivable why they cannot limit their liability, if the assured is in proper language told of the extent of the limitation, and it is not against public policy.

In *Billings v. Acc. Ins. Co. of N.A.* (1892), 64 Vt. 78, also, the assured had committed suicide, and the plaintiff contended that "deceased was so insane when he took his life, that he did not know what he was doing, nor the effect of his acts." The policy stipulated against "suicide, sane or insane." The court declared the insurers were perfectly justified in thus limiting their liability and added, *inter alia*:—"It is our duty to construe the contract made by the parties, not contract for them. The better construction to give a term or phrase in a contract is the one according to its ordinary and common meaning, as mankind would generally understand it. The insurer evidently was unwilling to incur the perils of insanity, and this clause, limiting its liability, was inserted for its protection. It was a valid contract. The insurer had the right to say that it would not hold itself responsible for the acts of the assured committed when insane, and the question is, can the court, with such a contract before it, attempt to measure the degree of insanity? The construction contended for by the beneficiary renders the words 'sane or insane' immaterial, surplusage, of no force whatever. They must have been inserted for some purpose. Felonious suicide was not alone in the contemplation of the parties to the contract. If it had been, there was no necessity of adding anything to the general words."

In conclusion the court said that, if it were to adopt the construction of the contract advanced by plaintiff, it would be "adding to it an element not agreed to by the parties."

¹ See cases in *Cooke on Life Ins.*, § 41.

² C.C.L.C. 2593, *supra* p. 645.

³ See *supra*.

The proof lies on the insurer and, if the death is explicable in two ways, the presumption is against suicide.¹

As said above, where suicide is stipulated against, or made a cause of forfeiture by law, it is limited to cases of intentional self-destruction, and cases of accident and uncontrollable impulse are excluded. It is an act by the insured that is contemplated, and it implies a will behind the act: in other words, a voluntary act. The weight of authority is, moreover, to the effect that the expression "die by his own hand" involves not only the idea that the act of self-destruction is voluntary, but that it is accompanied with a disability to distinguish right from wrong, or to understand its moral aspect and character. Thus, if the assured voluntarily kills himself by shooting himself through the heart, firmly believing that the act of pulling the trigger is morally right, though knowing that his death will in the natural course of things result from such act, the contract according to this view is not to be avoided.²

In a very recent decision in the United States, rendered upon the Missouri Statute, which provides "that in all suits upon policies of insurance on life hereafter issued by any company doing business in Missouri it shall be no defence that the assured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause that the assured contemplated suicide at the time he made his application for the policy and any stipulation to the contrary in the policy shall be void," was intended to establish a general rule applicable to the business of life insurance and not merely to limit the powers of a particular class of companies.³

¹ For a resume of the English and American cases in point see Porter's *Laws of Ins.* 123, *et seq.*; May, 307.

That burden of proof of suicide is on the party alleging it, was also ruled in *Hale v. Life Ind. & Inv. Co.*, 63 N. W. Rep. (1895), 1108; and *Mut. Life Ins. Co. v. Simpson*, 28 S. W. Rep. (1895), 837.

See also the very recent American case of *Crozier v. Home Life Ins. Co.*, 20 L.N. 168, and authorities cited there, where the court pointed out that the term "shot himself," as used in the proofs of death, does not necessarily mean "suicide."

² In support of the view that the exception covers all cases of intentional self-destruction, see the following decisions of the courts of England, New York and Massachusetts:—*Borradale v. Hunter*, 5 Scott N.R. 418 (1842).—*Dormay v. Borradale*, 10 Beavan 335 (1847).—*Clift v. Schwabe*, 3 C.B. 437 (1846).—*Meacham v. N. Y. State Mut. Ben. Ass.*, 120 N.Y. 237 (1890).—*Dean v. Am. Mut. Assoc.*, 4 Allen (Mass.) 96 (1862).

³ *Knights Templars & Masons Life Indemnity Co. v. Berry* (1892), 4 U.S. App. 353; and see *Beach on Ins.*, vol. 1, p. 59, § 71.

For other recent American decisions see:—*Keller v. Trav. Ins. Co.*, 24 Ins. L. J.

The question of *bona fide* interests of third parties came up in an English case. The facts were as follows:—An insurance company advanced money to one W. on a mortgage of real security and conditioned on his effecting a policy on his life in their office for the amount of the loan, which policy was deposited with the company as collateral security. The policy contained a condition that, if the insured died by his own hands, by the hands of justice, or by duelling, the policy should be void, except to the extent of any *bona fide* interests therein which, at the time of such death, should be vested in any other person or persons for a sufficient pecuniary or other consideration. W. committed suicide under temporary insanity, while the policy was in the hands of the company. The court was of opinion, that the company and the insured stood in the same position as if the policy had been mortgaged to any third person; that the company came within the exception in the condition and, therefore, that the policy was valid to the extent of the mortgage debt due to them at the death of the insured.¹

384. Death by the hands of justice or in violation of law.—The weight of authority is in favour of the view that the term "violation of law" should be restricted to cases of violation of criminal law.²

The act in violation of law and the act causing death must be part of the same continuous transaction.³

In a recent Quebec case,⁴ the effect of death occurring during a fight was very fully discussed.

(1895), 396.—*Sparks v. Knights Templars' and Masons' Life Ind. Co.*, 1 Mo. App. Rep. (1895) 334.—*Chicago Guar. Fund L. Soc. v. Wilson*, 55 Ill. App. 138.—*Mareck et al. v. Mut. Res. Fund Life Ass.*, 64 N. W. Rep. (1895), 68 ("Incontestable clause" held applicable; see also *infra*).—*Johns et al. v. N. W. Mut. Relief Ass.*, 63 N. W. Rep. (1895), 276; 41 Central L.J. (1895), 50.—*Mut. Res. Fund Life Ass. v. Payne*, 32 S. W. Rep. (1895), 1063 ("Incontestable clause" held applicable; see also *supra*).—*Weld v. Mut. Life Ins. Co.*, 61 Ill. App. 187.—*Ætna Life Ins. Co. v. Shoemaker*, 59 Ill. App. 643.—*McCoy v. N. W. Mut. Relief Ass.*, 66 N. W. Rep. (1896), 697.

In *Galentine v. Mut. Ben. Life Ins. Co.* (1895), 24 Fed. Rep. 159, where it was found that the assured committed suicide while insane, the liability of the company was, in accordance with a provision in the policy, held limited to the amount of the premiums actually paid with interest thereon.

¹ *White v. British Em. Mut. Life Ass. Co.*, 7 Eq. 394.

² See discussion in *Bloom v. Franklin Co.*, 97 Ind. 478 (1884), & *Bradley v. Mut. Ben. Co.*, 45 N. Y. 422 (1871). *Vide* also *Collins v. Bankers Acc. Ins. Co. et al.*, 64 N. W. Rep. 778 (1895).

³ *Cluff v. Mut. Ben. Co.*, 13 Allen (Mass.) 308 (1866).—*Bradley v. Mut. Co.*, *supra*, *Murray v. N. Y. Co.*, 96 N. Y. 614 (1884)—See also *supra* § 365, p. 599, note.

⁴ *Turnbull v. Travellers Ins. Co.*, R. J. Q. 2, S. C. 1 & R. J. Q. 4. S. C. 398.

In *Griffin v. Western Mut. Ben. Ass.* (1886), 20 Neb. 620, the evidence showed, that the assured had committed a robbery at the state treasury and, while trying to escape, was shot and killed by a watchman. The Supreme Court of Nebraska held, that the clause in the policy excepting death "while violating any law," was not applicable, the deceased having already obtained the money and endeavouring to escape when he was killed, was not, at the instant of death, violating any law, and there was, therefore, no forfeiture of the certificate. (This decision would hardly seem to do justice to the spirit of the provision in question, which evidently was intended and by both parties understood to apply not merely to the felonious act itself, but also to its natural consequences, *i.e.* trying to escape, the two acts being in reality but one continuous act).

Another case where the company unsuccessfully invoked the clause exempting them from liability in case of violation of, or attempt to violate, any criminal law, was *Darrow v. Family Fund Soc.*, (1889), 116 N. Y. 537. The company proposed to offer evidence that the assured died from the effects of poison taken with suicidal intent and thereby violated the law. The court, however, held that suicide is not a crime within the law, although the attempt to commit suicide is.

CHAPTER XXI.

ACTIONS BY AND AGAINST INSURANCE COMPANIES.

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MONEY DEPOSITED IN COURT BY DEFENDANT.

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400. ASSESSMENT UPON INTEREST.

401. JURY GIVING AN ANSWER BEYOND THEIR PROPER FUNCTIONS.

402. STAMPS ON POLICIES.

385. General remarks on actions.—There has been a considerable amount of litigation on the question of where and how action on insurance contracts should be brought, as well as upon other points of a similar nature.

Insurance decisions show that the courts are not inclined to look with favour upon technical objections to the payment of an honest loss. The following remarks are those of Canadian appellate judges:—"A less meritorious defence cannot be discovered among the cases which abound in our reports, in which insurance companies of litigious spirit have been defendants."¹—"I have approached the case with an anxious desire to assist the assured, if possible, against what I consider to be a most unrighteous defence, and I regret that a company should have felt itself justified in setting up a defence of the kind, when no fraud was contemplated,

¹ *Butler v. Standard Ins. Co.*, 4 A. R. 391, (1879).

and no possible injury could have been sustained by the company in consequence of the act of the assured.”¹—“Resistance to a just claim is a poor advertisement for any company; the defence is most discreditable to any company which desires to have the name of being respectable. I am, therefore, with regret, of opinion that the objection must be allowed.”²

On the other hand, it frequently happens, as in the case of *O'Hearn v. The Caledonian Insurance Company*,³ that a company, believing the loss to be caused by fraud, raises a technical defence successfully. In this case of *O'Hearn v. The Caledonian Insurance Company*, the evidence completely justified the company's position. The action was dismissed on the purely technical ground of want of formal notice (following *Guerin v. Manchester Ins. Co.*, R. J. Q., 5 Q. B. 434, *supra* § 368, p. 615, and *Young v. Acc. Ins. Co. of N. A.*, 20 S. C. R. 280, *supra* § 375, p. 617), although the company knew of the fire from the first and had refused to entertain the claim. The proof established also the plea of arson.

The question whether the same principles as to proof of arson should apply in a civil as in a criminal action was fully discussed in this case by Lynch, J., who ruled that the same degree of absolute certainty should not be required in a civil case as in a criminal action, but that, in the absence of positive proof, there should be such a preponderance of evidence, arising from all the facts and circumstances, tending to establish a just and reasonable presumption that the party charged must have committed the act; or, as expressed by Hall, J., in the *Central Vermont* insurance case, “that he must have committed the crime—the concurrent proof of circumstances that leaves no moral doubt as to the guilt of the accused.”⁴

Any judge, notary public, justice of the peace, police or stipendiary magistrate, recorder, mayor, commissioner authorized to take affidavits to be used either in the Provincial or Dominion courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the same before him, in attestation of

¹ *Gauthier v. Waterloo Ins. Co.*, 6 A. R. 231, (1881).

² *Peuchen v. City Mutual Ins. Co.*, 18 A. R. 446, (1891). *MacIennan*, 107.

³ Decided at Montreal, 23rd Oct., 1897, and not yet reported.

⁴ *Roscoe's Criminal Evidence*, p. 16.—*Starkie on Evidence*, No. 818.—*Best on Evidence*, No. 95.—*Wood on Fire Ins.*, p. 1184.

the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing.¹

Any affidavit, affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of, or injury to, person, property or life insured or assured therein, may be taken before any commissioner or other person authorized to take affidavits, or before any justice of the peace, or before any notary public for any province of Canada; and such officer is required to take such affidavit, affirmation or declaration.²

386. *Lex loci contractus*—Place where action may be brought.—Any contract of insurance on property within the jurisdiction of the province of Ontario, or concerning a person domiciled therein, and issued or delivered in Ontario, is deemed made in Ontario, and will be construed according to the law thereof; and all moneys payable under the contract must be paid at the office of the company in Ontario, notwithstanding any stipulation to the contrary.³

Where, under an Ontario contract, money is payable by a corporation having its head office in Ontario, to the representative of a person domiciled at his death in another jurisdiction, and there is no personal representative in Ontario, the money may be paid two months after such death to the personal representative appointed by the court of the other jurisdiction, provided the domicile at the time of death is satisfactorily established.⁴

It has been said that the *lex loci contractus* governs the contract of insurance, but the question, *where* the contract was made, usually resolves itself into the question, *when* it was made or consummated. As where the policy is issued by a company having its home office in one state, the insured being a resident of another state, and it being delivered to him there. The question of *when* the contract is consummated is not necessarily determined by the time of the delivery of the policy, and if the application is unconditionally accepted by the company at its home office, that is the place where the contract is made, irrespective of the policy (which merely evidences the contract) being delivered at another time and place. Thus, a policy taken out by a resident in Canada in a New

¹ Canada Evidence Act, 1893, 56 Vic., cap. 31, s. 26. ² *Ib.*, s. 27.

³ 60 Vic., c. 36 (O.), s. 143. ⁴ 60 Vic., c. 36 (O.), s. 156, ss. 1.

York company, is governed by the law of New York, where the proposal was made to the company's agent in Canada, who had no authority to consummate the contract, but sent the proposal to New York, where the policy was prepared and sent on and delivered in Canada to the insured.¹

A fortiori, the head office is the place of the contract, if by its terms the contract is to be performed there. The act of payment by the insurer constitutes performance.²

It has also been said, that in the United States an assignment is not a distinct contract, but an incident of the original contract and governed by the law of the place of the latter;³ but this is not the rule in Canada and England;⁴ and, of course, each state may prescribe its own conditions regarding foreign insurance companies, which will take effect whatever the intent of the parties.

In Quebec, an insurance company may be summoned for rights arising out of a fire insurance policy before the court of the place in which the insured movables or immovables were; and for rights arising out of a life policy, before the court of the place in which the insured had or has his domicile.⁵

Insurance companies are also liable in Quebec to be summoned as other corporations under the general law.⁶

¹ Equitable Co. v. Perrault, 26 L. C. J. 382 (1882); and see Cooke on Life Ins., § 5.

² Cooke on Life Ins., § 5. ³ Mut. Co. v. Allen, 138 Mass. 24 (1884).

⁴ Lee v. Abdy, 17 L. R., Q. B. D., 309 (1886).—Toronto Gen. Trusts Co. v. Sewell, 17 O. R. 442 (1889).—Scottish Prov't Ins. v. Cohen, 16 Scotch Sess. Cas., 4 series, 112 (1888).

For other recent American decisions see:—Smith v. N. Y. Life Ins. Co. (1893), 57 Fed. Rep. 133, where the policy was on the life of the husband, who was afterwards divorced from his wife and was to deliver to her this policy, but assigned it with other personal property to a third party. After his death, his wife, then living in California, obtained letters of administration and brought an action against the company in the Federal Court of that district. A trust company had obtained letters of administration *c. t. a.* in Illinois, and brought an action in that state. The court cited the case of New England Mut. Life Ins. Co. v. Woodworth, 111, U. S., s. c. 4 S. Ct. Rep. 364, and declared the policy to be undoubtedly an asset in California.

In Ins. Co. of N. A. v. McLimans (1890), 28 Neb. 653, the insurer was a Pennsylvania company; the contract was made in Iowa upon property located in that state, the owner living in Nebraska. A loss having occurred, the assured brought his action in a county of Nebraska, service of summons being upon an agent of the company residing in that county. The Supreme Court of Nebraska said *inter alia*:—"A contract of insurance is personal in its nature, and action may be brought wherever service may be had upon the insurer."

⁵ C. P. 95; and see R. S. Q. 5861.

⁶ C. P. 94 *et seq.*—O'Malley v. Scottish Comm. Ins. Co., 4 Q. L. R. 226.—Tourigny v. Ottawa Agric. Ins. Co., 3 L. N. 19.—Pattison v. Mut. Ins. Co. of Stanstead, 16 L. C. J. 25.—Eastern Townships Mut. Fire Ins. Co. v. Bienvenue, 2 L. N. 363.—Mutual Fire Ins. Co. of Stanstead v. Galiput, 3 L. N. 239.—O'Hearn v. Caledonian Ins. Co., Superior Court, Montreal, 31 Dec., 1896, not yet reported (see *supra* § 385).

Where defendants were a foreign insurance company doing business in Ontario and having a head office for the province in Toronto, the writ of summons was served on the local agent of the defendants' company at Ottawa, and it was ruled that the service was good.¹

387. Evidence rejected in absence of plea of arson—Grounds on which it is offered must be stated in court below.—In an action on a policy of insurance against fire on a stock of goods, the verdict for the plaintiff was moved against on the ground of its being against the weight of evidence and of improper exclusion of evidence. The first ground was mainly urged in regard to the amount of damages. As to the second ground, the evidence tendered related to the fact that a quantity of unburned matches and shavings had been found near the part of the premises in which the fire occurred, where the bulk of the goods were alleged to have been burned. The evidence was rejected by the trial judge for the reason that there was no defence pleaded that the fire was incendiary, and on appeal to the full court below it was for the first time urged that it was admissible as showing the nature and extent of the fire in the vicinity. The verdict for the plaintiffs was sustained by the full court. On appeal to the Supreme Court of Canada, it was held, Gwynne, J., dissenting, that the decision of the Supreme Court of Nova Scotia should be affirmed. Per Ritchie, C.J., that, though the amount of the damages found in the case was not satisfactory and might well have been submitted to a jury of business men as a question proper for their determination, he would not dissent from the judgment dismissing the appeal. As to the other ground, the evidence was rightly rejected. When evidence is tendered, the judge and opposing counsel are entitled to know the ground on which it is offered and none can be urged on appeal that has not been put forward at the trial.²

388. Power of court to set aside verdict.—In an action on a life policy, tried before a judge and a jury in accordance with the provisions of 37 V., c. 7, s. 32 (O.), the learned judge, in place of requiring the jury to render a general verdict, directed them to answer certain questions, and the jury having answered all the questions in favor of the plaintiff, the judge entered a verdict for

¹ *Wilson v. Aetna Life Ass. Co.*, 8 P. R. 131.

² *Supreme Court of Canada, Royal Ins. Co. v. Duffus*, 18 S.C.R. 711.

the plaintiff. Upon a rule *nisi*, to show cause why this verdict should not be set aside and a non-suit or a verdict entered for defendants, pursuant to the "Law Reform Act," or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendants, the Court of Queen's Bench made the rule absolute to enter a verdict for the defendants. The appellant then appealed to the Court of Appeal for Ontario, and the court being equally divided the appeal was dismissed. It was held, Taschereau, J., dissenting, that the Court of Queen's Bench had no power to set aside the verdict for the plaintiff and direct a verdict to be entered for the defendants, in direct opposition to the finding of the jury on a material issue. That the court below might have ordered a new trial upon the ground that the finding of the jury, upon the questions submitted to them, was against the weight of evidence, but they exercised their discretion in declining to act or in not acting on this ground, and therefore no appeal to the Supreme Court of Canada would lie on such ground, under s. 22, 38 V., c. 11.

That if an amendment to a plea was authorized by the court below, but such amendment was never actually made, the Supreme Court has no power to consider the case as if the amendment had in effect been made. (But see Supreme and Exchequer Courts Amendments Act, 1880).

Per Gwynne, J. : That the plaintiff never could have been non-suited in virtue of 37 V., c. 7, s. 33 (O.), as it is only where it can be said that there is not any evidence in support of the plaintiff's case, that a non-suit can be entered, and that the proper verdict, which the law required to be entered upon the answers of the jury, was one in favor of the plaintiff.

This case was appealed and the Lords of the Judicial Committee of the Privy Council affirmed the first holding of the Supreme Court. As to the second holding, it was held, that the Supreme and Exchequer Courts Act, s. 38, gives the Supreme Court power to give any judgment which the court below might or ought to have given and, amongst other things, to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power was not taken away by s. 22 in this case, in which the court below did not exercise any discretion as to the question of a new

trial, and where the appeal from their judgment did not relate to that subject.¹

389. Plea of "non est factum."—To a declaration on a policy of insurance made by defendants, but not averring that it was under the corporate seal, the defendants pleaded *non est factum*. The plea was held good, for that the declaration set forth a complete instrument, a policy of insurance made by defendants, a corporation which *ex vi termini*, imported a seal; and in any event the plaintiff could not be embarrassed by the plea, as it must under the O. J. Act, Rules 141 (Con. Rule 413) and 493 be treated as a mere denial of the making of the contract of insurance in fact, and not of its legality or sufficiency in law.²

390. Consolidation of actions.—In case of several actions being brought in Ontario for insurance money, the court consolidates or otherwise deals therewith so that there shall be but one action for and in respect of the shares of all the persons entitled under a policy.³

Where a right of suit exists in a body of persons too numerous to be all made parties, the court will permit one or more of them to sue on behalf of all, subject to the restriction that the relief prayed is one in which the parties whom the plaintiff professes to represent, have all of them an interest identical with that of the plaintiff.

But where a mutual insurance company had established three distinct branches in one of which, the waterworks branch, the plaintiff insured giving his promissory note or undertaking to pay \$168, and the company made an assessment on all notes and threatened suit in the Division Court for payment of such assessment, whereupon the plaintiff filed a bill "on behalf of himself and the other policy holders associated with him as hereinafter mentioned," alleging the company was about to sue him and the other policy holders in said branch, that large losses had occurred in the company prior to the time of his effecting his insurance, and insisting that he and the other policy holders could be properly assessed

¹ Moore v. Conn. Mut. Life Ins. Co., 6 S.C.R. 634, 6 App. Cases 644. The judgment of the Judicial Committee will also be found printed as an appendix to the Supreme Court Reports. See also report of case in 41 U.C.Q.B. 497 and in 3 O. A. R. 331.

² Burnett v. Union Mut. Fire Ins. Co., 32 C.P. 134.

³ 60 Vic., c. 36 (O), s. 146.

only in respect of such losses as had arisen since they entered the company, and praying that the necessary inquiries might be made and the counts taken, alleging that the Division Court had not the machinery for that purpose:—It was decided, that according to the statements of the bill the policy holders in the waterworks branch were not represented in the suit, and a demurrer on that ground filed by the company was allowed with costs.¹

391. Interest on amount of loss allowed.—In actions on policies of insurance in Ontario the jury may give interest over and above the money recoverable thereon.²

In Quebec, interest runs from the date of the action.³

In an action upon fire insurance policies, a referee was directed to enquire, ascertain and report the amount of the loss. It was held, having regard to the provisions of ss. 87 and 103 of R. S. O. (1887), c. 44, that the referee had authority to allow interest on the amount of the loss as ascertained by him.⁴

392. "Exception dilatoire" on account of criminal charge against plaintiff.—In an action brought to recover upon a policy of insurance, an *exception dilatoire*, in which it was alleged that a true bill had been found by the grand jury and was pending against the plaintiff on a charge of arson with a view to defraud the defendant, and that, therefore, all proceedings in the case must be stayed and held in abeyance until he should have been tried upon an indictment, must be dismissed, and the existence of a criminal charge against the plaintiff cannot operate a suspension of proceedings in the action against the defendant.⁵

393. Annulment of policy must be demanded.—In a plea invoking nullity of the insurance contract because of false repre-

¹ Thompson v. Victoria Mut. Fire Ins. Co., 29 Chy. 56.

² 58 Vic., c. 12 (O.), s. 120. ³ C.C.L.C. 1077, 1078.

⁴ Attorney General v. Ætna Ins. Co., 13 P.R. 459.

As to measure of damages recoverable under a policy of life assurance, payable if the insured survives a certain day, the plaintiff can recover interest only from the date of the writ, unless in his declaration he alleges a demand before that time. For, if the policy is payable ninety days after due notice and satisfactory evidence of the death of the person whose life is insured, or, if he survives a certain day, is then payable to him, the ninety days clause has no application to the latter contingency, and interest is not payable except as damages for wrongfully withholding the money. This was the decision rendered in the case of *Pierce v. Charter Oak Life Ins. Co.* (1884), 138 Masa. 151.

⁵ Maguire v. L'pl & L'dn & Globe Ins. Co., 7 L.C.R. 343.

sentation, fraud, etc., the annulment of the policy must be demanded in the conclusion of the plea, otherwise the action against the insured will be maintained.¹

394. Withdrawal by plaintiff of money deposited in court by defendant.—In the very recent case of *Heward v. Scottish Union & National Insurance Company*,² the company defendant deposited with the court the amount for which it acknowledged liability. The plaintiff made a motion to be permitted to withdraw this amount on account and continue the action, which motion was granted by the court, seeing that the offers of the defendant were not conditional.

¹ *Sovereign Fire Ins. Co. of Canada v. Pruneau*, 14 R. L. 362 (Q. B. 1885).

² *Supra* § 382.

The following rules of evidence taken from actions on fire insurance policies, instituted in the United States, although for the greater part touching points already discussed in previous chapters of this work, are important enough to have a place in the present chapter.

Parol evidence in contradiction of the terms of an insurance policy should be excluded.—*Robinson v. German Ins. Co.*, (1880), 51 Ark. 441.

Evidence of the situation of the premises insured, at the time the policy was issued, and of the arrangement made, and of what was said by the agent of the company, is admissible in an action upon a fire policy.—(*Beach*, 1322).

Experts in fire insurance may properly be permitted to testify as to whether a change in the use of insured property in a certain respect increased the risk.—*Russell v. Cedar Rapids Ins. Co.* (1880), 78 Iowa 216.

Merchants who were engaged in different lines of trade, but who had seen the stock of merchandise in question before it was destroyed by fire, were held competent to testify as to the value of such stock, though their testimony was of an unsatisfactory character.—*Graves v. Merchants & Bankers Ins. Co.* (1891), 82 Iowa 637.

Where an answer to a complaint upon a policy of insurance avers that material statements in the plaintiff's application for insurance are not true, a replication thereto averring that the plaintiff did not make or sign the application, but that it was written without his knowledge by the agent of the insurance company, unattacked by demurrer or motion, makes the responsibility for the application a material issue in the case, and entitles the insured to testify that he did not make or sign it, and to give his version of what actually took place between himself and the agent in reference to the application.—*State Ins. Co. v. Taylor* (1890), 14 Colo. 490, *supra*.

The assured must allege and prove that the preliminary proof of loss, required by a policy, has been made, or that the requirement has been waived.—*McCormack v. North British & Merc. Ins. Co.* (1889), 78 Cal. 408.

The New York Court of Appeals has declared these rules of evidence:—In an action upon a policy of fire insurance in which the identity of the building insured is disputed, where the policy accurately describes one building, extrinsic evidence tending to show that a building other and different from that described was intended is inadmissible. So, also, where the agent of an insurance company has no authority to enter into contracts of insurance on behalf of his principal, but is simply authorized to make surveys and make applications, the company passing upon them and a policy is issued by it, which covers one piece of property, definitely and distinctly described, it cannot in an action upon the policy be turned into a contract

insuring another piece of property on proof that the agent made out the application and by mistake described the wrong property.—*Landers. v. Cooper* (1889), 115 N. Y. 279.

Where the defence to an action upon a fire insurance policy is that the insured was not the owner of the premises in question, it is competent to show that the deed, under which the insured claims, had been delivered in escrow only.—*Beach*, 1323.

An agent should be allowed to testify as to the extent of his powers, when it becomes material in an action on a contract made by him for his principal.—*Phoenix Ins. Co. v. Copeland* (1889), 88 Ala. 351.

The complaint in an action on a policy, alleging an offer of subrogation to the insurance company, and no motion being made to strike it out as immaterial, but a general denial only being filed, the defendant cannot object to the admission of evidence to prove the offer.—(*Beach*, 1323).

In *Phoenix Ins. Co. v. Munger* (1892), 49 Kan. 178, the Supreme Court of Kansas held, that it was error for the Court to admit evidence as to the practice of other insurance agents in the same town to establish the custom that proofs of loss were not required. Such evidence should be limited to the custom and usage of the company charged with liability, and is only competent then to show the power and authority given to the agent.

It was held in Minnesota, in the case of *Dade v. Aetna Ins. Co.* (1893), 56 N. W. Rep. 48, that notice at the trial to the company's attorneys to produce proofs of loss sent by the insured to the company in a distant state, it not appearing that they were within reach of these attorneys at that time, was insufficient to lay the foundation for secondary evidence. It was further held, that where proofs of loss were shown to have been properly mailed to the company at their place of business or the home office, it would be presumed that they were received in due course of mail, till the contrary is made to appear.

In an action to foreclose a mortgage, brought by an insurance company, the court found, that the company issued a policy of insurance to one of the defendants upon a dwelling house, situated upon mortgaged premises, and made the loss payable to the mortgagee, and that the mortgagee assigned the notes, mortgage and the policy to another with the knowledge of the insurer, and that the property insured was totally destroyed by fire, of which the company had notice, and that it inspected the loss, and after such inspection paid the amount of the policy to the assignee, and took an assignment of the notes, mortgage and policy to itself. The Supreme Court of Kansas held, that such findings were sufficient to show an indebtedness upon the part of the company to the defendant to an amount equal to the policy, and that such payments should be considered as a satisfaction *pro tanto* of the amount due on the notes and mortgage.—*Home Ins. Co. v. Marshall* (1892), 48 Kan. 235.

In another case before the same court, (*Phoenix Ins. Co. of Hartford v. Dolan*, 1893), 30 Kan. 725), it appeared that a dwelling house and lot were mortgaged by the owners to secure a note, and the house was insured against loss by fire. It was agreed that the loss, if any, was payable to the mortgagee or his assigns. The note and mortgage were assigned to the company which had insured the house. The mortgagees conveyed the property to one who assumed the payment of the mortgage debt. This was an action brought against this person by the insurance company to recover upon the note and to foreclose the mortgage assigned to it. Defendant answered, that the house had been destroyed by fire and the loss had accrued to him and should be credited upon the mortgage debt. It was ruled upon the trial, that the burden of proof was on the defendant, and he offered in evidence the insurance policy and also a paper purporting to be a receipt of payment by the insurance company to the original mortgagee, and rested. The execution, identity or genuineness of this last paper was not shown. The Supreme Court of Kansas held, that the testimony was insufficient to show that a loss had occurred, or that defendant was entitled to a credit upon its mortgage debt for any loss.

A mortgagee, to whom a policy issued to mortgagor is made payable, may sue alone, where his claim exceeds the amount of the insurance.—*Travelers Ins. Co. v. California Ins. Co.* (1890), 1 N.D. 151, *infra*. But the better practice is for the mortgagor and mortgagee both to sue.—(Beach, 1285).

In *Bartlett v. Iowa State Ins. Co.* (1890), 77 Iowa 86, the court was of opinion that the holder of a mortgage on insured property, at the time of a loss, might maintain an action on the policy, it containing the provision: "Loss, if any, payable to mortgagees as their interest may appear," there being no other mortgagee, although the mortgage, before the action was brought, was satisfied, the consideration of the satisfaction being a transfer of the damaged property and the policy.

Where a policy is issued to one party and assigned to another, who has succeeded to the interest in the property covered by the policy, and in consenting to such assignment the company agrees that the "loss, if any, shall be payable to (the assignee) mortgagee, as his interest may appear," an action may be sustained in the assignee's name, but the complaint must make his interest appear.—*Vide Chrisman v. State Ins. Co.* (1888), 16 Or. 283.

In the case of *West Coast Lumber Co. v. State Invest. & Ins. Co.* (Cal. 1893), 33 Pac. Rep. 258, referred to at length *supra* § 379, note, it was held by the Supreme Court of California, that the person to whom the loss was made payable, might maintain an action in his own name for the amount of the loss, where the value of his interest in the property exceeded such amount. The court said, bearing upon their ruling:—"Under our law an action may be maintained by the party in interest. The courts, with some exceptions, held that the party to whom the loss is payable may sue:—*Cone v. Ins. Co.*, 60 N.Y. 619; *Chamberlain v. Ins. Co.*, 55 N.H. 249. It is sufficient to say under this head, that decisions to like effect are to be found emanating from the courts of Missouri, New Jersey, Illinois and many other states. Where the proceeds of the policy are to go in part to the assured and in part to others, the authorities are not uniform as to the proper plaintiff. The better opinion, however, is believed to be that all the beneficiaries may unite as plaintiffs in the action."

The court decided in *Maxey v. New Hampshire Fire Ins. Co. of Manchester* (Minn. 1893), 55 N.W. Rep. 1130, that a fire insurance policy, by the terms of which the loss, if any, is made payable to a mortgagee as his interest may appear, is a contract for the benefit of such mortgagee; and he, or a person to whom he has assigned the claim after a cause of action has accrued, is entitled to recover in his own name the full amount of the insurance if the same does not exceed the amount due upon the mortgage.

A mere contract of reinsurance creates no privity between the original insured and the reinsurer, but where the loss or risk is expressly assumed by another company, the original insured may sue upon such contract, as having been made for his benefit. This was decided in *Travelers Ins. Co. v. California Ins. Co.* (1890), 1 N.D. 151, *supra*.

The Kansas Supreme Court has held that, where a contractor desired insurance on a building which he was erecting, and went with the owner to an agent to make application therefor, and, at the agent's suggestion, a policy for three years was written in the name of the owner, containing the clause "with a contractor's insurance for thirty days," the policy might be enforced in an action by the contractor, the fire having occurred within thirty days after its issue. Such was the ruling in *German Fire Ins. Co. v. Thompson* (1890) 43 Kan. 567.

In *Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co.*, (1890), 41 Fed. Rep. 271, the court decided that warehousemen who have insured, in their own name, cotton stored in their warehouse, on a form of policy containing the special clause "cotton in bales, their own, or held by them in trust or on commission, or on joint account with others, or sold but not delivered," usual in warehouse insurance, may sue in their own names and on proper proof recover the entire amount of the loss.

The Court of Appeals of West Virginia has held in *Murdock v. Franklin Ins. Co.*

(1889), 33 W. Va. 407, that where one hires personalty of another, and has it in his custody and control, he may insure it in his own name for the benefit of the owner; and having done so with the authority of the latter, he may sue upon the policy in his own name, averring the property insured to be his, and recover for the benefit of the owner.

In an action against the Georgia Home Ins. Co., referred to in *Ins. & Fin. Chronicle*, vol. xvii, p. 415, it has quite recently been decided, that "when the holder of an insurance policy, deliberately and after full opportunity for investigation, accepted from the adjuster of the company a sum in full payment of the loss claimed by him and gave his receipt therefor, he could not afterwards maintain an action against the company for the same loss, on the ground that he had been defrauded into making a settlement by certain statements of the adjuster that for certain reasons the company was not liable, it not appearing that the adjuster, even if the statements in question were incorrect, had done anything to prevent the complainant making a full investigation of his legal rights in the premises."

The following were held questions for the court and jury :—

Where there is no dispute as to facts, whether the requirements of the policy have been complied with is a question of law for the court.—*Baker v. German Fire Ins. Co.* (1890), 124 Ind. 490.

The question in an action on a fire policy, whether the insured building had become vacant and unoccupied, is one of fact to be determined by the jury on the evidence.—(Beach, 1337).

Where the assured is bound by the stipulations of a policy sued upon to make diligent effort to save his property, whether any part of his loss was due to his neglect to make such effort is a question for the jury.—*Jones v. Howard Ins. Co.* (1889), 117 N.Y. 103.

The testimony in a case showing that proofs of loss were furnished within the time prescribed in a policy, that all the assured's books and papers were promptly presented on the insurer's demand, that adjustment of the loss was delayed by the company upon various pretexts, and that, after the limitation as to bringing suit had expired, the company offered to go on and adjust the loss upon receipt of other books and papers demanded, it was held, that the question whether or not the limitation had been waived by the company must be submitted to the jury.—*Bonert v. Penn. Ins. Co.* (1889), 129 Pa. St. 558.

Where the defence to an action on a fire policy was based upon a violation of the condition as to the insured property being upon leased land, the testimony of two agents of the company that, before the policy was issued, they had "general knowledge" that the building stood on leased ground, though they had no particular knowledge thereof, has been held sufficient to submit to the jury on the question of their knowledge, there being no pretence of intentional misrepresentation on the part of the insured.—*Brothers v. California Ins. Co.* (1889), 3 N.Y. Suppl. 89.

In a Missouri case, where the plaintiff averred in his petition that, at the time the policy was issued, the insured's agent agreed with him that the policy should not expire; that he would renew the same from year to year; that the plaintiff should have time to pay the premiums and pay them at his convenience; and that it would not affect the policy and insurance thereon if the certificates of renewal were not delivered before any accident by burning; and the defendants denied the averments, it was held by the Supreme Court, that the burden was on the plaintiff to prove the statements alleged to have been made to him; and where the evidence was conflicting, the question, whether it preponderated for or against the plaintiff, was for the jury and not for the court to decide.—(Beach 1338).

Whether under the condition in a fire insurance policy, rendering a policy void by reason of the premises insured being used for manufacturing or other purposes different from that set forth in the application or policy, or if the risk should be so increased by means within the control of the assured, in an action upon such policy the use made of the premises by the assured materially increased the risk, is a

395. Annulment of transfer, and rectification of error in life insurance policy.—Where a widow, as trustee of the insolvent succession of her late husband, sued the defendant and the other defendant, the *Sun Mutual Life Insurance Company*, to annul the transfer of a policy of \$2000 on her husband's life, which she had transferred before his death for the benefit of his creditors, and asking that the money be paid over to her, the suit was brought in Montreal, where defendant resided. Defendant thereupon instituted proceedings in the Court of Chancery, Ontario, to enjoin the insurance company from paying the amount to plaintiff. The insurance company, in turn, prayed that the other defendant be enjoined to desist from his proceedings before the Court of Chancery:—It was held, that the court had no jurisdiction. The Quebec Statute 41 Vic., c. 14, limited the issue of injunctions to the cases specially mentioned therein.¹

It was also held, that the *créance* resulting from the insurance was a *meuble incorporel*, and whether it were considered the property of the wife or of the succession of the husband, was governed by the law of Ontario, and would be more properly discussed in the Court of Chancery of that province.²

In an action on a premium note given for a life insurance policy, the plea was, that the policy was different from what was agreed upon between defendant and the plaintiff's agent. The policy was payable at death only, whereas it was to be made payable in twenty years. The evidence was conflicting, but it was held in review, reversing the first judgment, that the defendant evidently understood that it would be made payable in twenty years, and the action was therefore dismissed.³

question of fact for the jury, and they are not concluded by the testimony of experts upon that point.—*Kircher v. Milw. Mech. Mut. Ins. Co.* (1880), 74 Wis. 470.

Whether or not a change in the use of insured premises, from a general merchandise store with coal oil lamps to a variety theatre with electric lights, increased the risk, in violation of a provision that the policy should be void if the hazard should be increased by any change in the possession, was held by the Supreme Court of Oregon to be a question for the jury, and expert testimony was inadmissible, the determination of the question involving simply matters of common knowledge or observation.—*Hahn v. Guardian Ass. Co.* (Or. 1893), 32 Pac. Rep. 683.

¹ *Parent v. Shearer et al.*, 2 L. N. 125, and 23 L. C. J. 42, S. C., 1879. ² *Ib.*

³ *Sun Mutual Life Ins. Co. & Beland*, 5 L. N. 42.

The following are rules of evidence as laid down in actions on life insurance policies in United States courts. They are in some respects analogous to other cases recorded *supra* :—

Where defendant alleges that the policy sued on was taken out by plaintiff as a wagering policy, its agent may testify that he urged the party to apply, and that the

assured paid the premium and thought at first of making plaintiff's minor children the beneficiaries, but concluded to make plaintiff the beneficiary, in order that in the event of his marriage it might be changed more easily.—(Beach, 1325).

In an action at law on a policy of life insurance, payable at a day named in the policy, evidence is inadmissible, in defence, to show that a different day should have been written.—*Pierce v. Charter Oak Life Ins. Co.* (1884), 138 Mass. 151.

The issue in one case was as to the authority of a general agent of a life insurance company to agree for a rebate of premium to the policy holder. It was held, that upon such issue evidence might be given of similar contracts made about the same time by the agent with different parties, approved or adopted by the company; but, if it appeared that the company's contract in relation to the other contracts proceeded in disaffirmance of the agent's authority to make them, testimony concerning them would not be relevant to the issue on trial.—*Thompson v. N. Y. Life Ins. Co.* (1892), 21 Or. 466.

Where a company defended an action in Pennsylvania on the ground that they had, without notice of an adverse claim, paid the sum assured to an assignee of the policy, the burden was held to be upon the plaintiff to rebut the *prima facie* defence, by evidence that the assignment was fraudulently obtained from the assured, and that before payment the company had notice. And to rebut this defence, evidence of the acts and declarations of the company's local agent to solicit insurance, made after the payment upon such assignment and receipt, was held inadmissible without evidence that the agent's knowledge was acquired, and his acts done, as the sub-agent of the company, and within the scope of his duties as such. Further, evidence that a letter was written and mailed to the company by one who wrote as a stranger, and not as having authority, directing the company not to pay, was insufficient to put the company upon notice or inquiry.—*Northwestern Mut. Life Ins. Co. v. Roth* (1886), 118 Pa. St. 329.

The burden of proof as to the forfeiture of a policy is with the defendant, it being an affirmative defence. Declarations by the insured, admitting forfeiture of the policy, are not admissible in an action upon a life policy as against the beneficiary.—*Dial v. Valley Mut. Life Ass.* (1849), 29 So. C. 500, *infra* p. 666.

Statements of the agent of a company, relative to his insuring the deceased, made subsequent to such insurance, cannot be proven against the company as part of the *res gesta* in an action on a life policy.—(Beach, 1327).

Evidence of a breach of warranty, by taking other insurance, is inadmissible where no such defence is alleged in the answer.—(Beach, 1327).

Where a life assurance policy provides that, if the assured should die by his own hand when insane, the company should only be liable for the premiums actually paid, with interest, the burden of showing the condition of mind is on the defendant, and it must establish not only his insanity, but that he fired the shot with intent to take his life.—*Mut. Ben. Life Ins. Co. v. Davis' Ex'r* (1889), 87 Ky. 541.

On the question of privileged communications, the Supreme Court of the United States has held, that the provision in the New York Civil Code, that "a person fully authorized to practise physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," is obligatory upon the courts of the United States sitting within that state in trials at common law.—*Conn. Mut. Life Ins. Co. v. Union Trust Co.* (1884), 112 U. S. 250.

In *Adreveno v. Mut. Res. Fund Life Ass.* (1888), 34 Fed. Rep., 870, Thayer, J., in the Federal Court for the Eastern District of Missouri, has held, that the provision of the Missouri statute, prohibiting a physician from testifying as to any information he may have acquired from any patient while visiting him professionally, may be waived by the patient, and, when waived by a clause in an application for life insurance, such waiver is binding on the beneficiary. He said:—"It has been held in this state in three cases, viz.: the case of *Groll v. Tower*, 85 Mo. 253; *Carrington v. City of St. Louis*, 80 Mo. 208; s. c. 1 S. W. Rep. 240; and *Squires v. City of Chilli-*

396. Policy reserving control of legal proceedings to company.—In an action upon an employer's liability policy, whereby the defendants agreed to pay the plaintiff all sums up to a certain

cothe, 89 Mo. 226; s. c. 1 S. W. Rep. 23, that this statute renders a physician incompetent to testify as to the physical condition of a patient in those cases only where the patient or his legal representatives insist that he shall not testify. In other words, the statute is construed in this state as conferring a privilege merely that may be waived; it is not declaratory of any public policy. The public is not concerned in excluding the testimony of a physician as to the condition of a patient, if the patient himself does not object to such disclosures. In this respect, the courts of this state follow the rulings in New York and Michigan under a similar statute, as appears by the cases of *Cohen v. Ins. Co.*, 41 N. Y. Super. Ct. 296; *Railroad Co. v. Martin*, 41 Mich. 667; s. c. 3 N. W. Rep. 173. As the patient is at liberty to waive the privilege which the law affords him, it appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit is brought."

Statements in the proof of death made by the physician of the insured, as to the previous complaints and ailments of the insured, are privileged communications within the meaning of the Indiana statute and not admissible to show that the answers made to certain questions in the application for insurance were false.—*Dreier v. Continental Life Ins. Co. of Hartford* (1885), 24 Fed. Rep. 670.

The following are decisions on questions for the jury:—

Where, in an action on a life policy, the defence being that the insured had falsely stated in his application that he had not employed a physician during the preceding year, a physician testified that he had prescribed for the insured during that period, and members of the family of insured, whom he testified were present at the time, testified that they had no recollection of the circumstance, the Supreme Court of Pennsylvania held, that it was proper to submit the question to the jury, as the physician might have been mistaken as to the date.—(Beach, 1338).

An objection that an action on a life insurance policy should not have been tried by a jury, because an equitable defence was pleaded, comes too late when it is first made on an appeal.—*Megrue v. United Life & Acc. Ins. Co.* (1893), *infra*.

There being evidence in an action on a life policy that the plaintiff applied to the local agent and secretary of the insurer for blanks for making out proof of the death of the insured, and they were refused on the ground that the policy had been forfeited, the Supreme Court of South Carolina held, that a motion for nonsuit was properly refused, there being evidence of the condition requiring proof which should be submitted to the jury.—*Dial v. Valley Mut. Life Ass.* (1899), 29 S. C. 560, *supra* p. 665.

In an action on a life insurance policy, it will not be held as a matter of law that the insanity of the insured, when the application for insurance was made, was an unsound condition of health. It is a question of fact to be solved by the evidence. Where there is evidence, in an action upon a life insurance policy in which an equitable defence has been filed, to support the contentions of both parties on the vital issues, it is proper to submit the issues to the jury.—*Megrue v. United Life & Acc. Ins. Co.* (1893), 24 N. Y. Suppl. 618, *supra*.

Where a policy of life insurance had been lost, the Maryland Court of Appeals held, that it was for the jury to say, in an action upon it, whether the defendant had proved that it contained the clause against actions after the lapse of six months from the death.—(Beach, 1327).

Even where the application is made a part of the contract, yet, ordinarily at least, it contains none of the obligations assumed by the insurer; hence, it is necessary, in an action against the insurer on the contract, for the plaintiff to set out the application as a part of the contract.—*Britt v. Mut. Ben. Co.*, 16 S. E. Rep. 896, (1900).

limit, and full costs of suit, if any, in respect of which the plaintiff should become liable to his employees for injuries received whilst in his service, subject to the condition, amongst others, that "if any proceedings be taken to enforce any claim, the company shall have the absolute conduct and control of defending the same throughout, in the name and on behalf of the employer, retaining or employing their own solicitors and counsel therefor"; that the plaintiff was not entitled, in the face of such a stipulation, to claim from the defendants the amount of a judgment obtained against him by an employee in an action defended by the plaintiff through his own solicitor and counsel, leaving the defendants to show as a defence or by way of counter-claim that they could have done better by defending it themselves; nor was an offer by the plaintiff, at a time when the action was at issue and on the peremptory list for trial the following day, to hand over the defence to the defendants' solicitors a sufficient compliance with the condition.¹

397. Notice of transfer and subrogation a condition precedent to suit by company.—In the case of the *R. & O. N. Co. & Lafrenière*,² the action was brought to recover the value of a cargo of peas lost in consequence of a collision with a steamboat belonging to defendants, in Lachine Canal. Upon the plea that plaintiff had been paid the value of the peas by the insurers, for whom plaintiffs were a mere *prête nom* and had no interest, it was decided, confirming the judgment of the court below, that, notwithstanding the payment by the insurers, the latter had no right to sue until notice of the transfer and subrogation, and the action was properly brought.

398. Measure of damages recoverable.—In an action against the G. T. R. Co. for causing the death of the plaintiff's husband by negligence of their servants, it appeared that the life of the deceased was insured, and on the trial the learned judge deducted the amount of the insurance from the damages assessed. The Divisional Court overruled this and directed the verdict to stand for the full amount found by the jury. This was affirmed by the Court of Appeal. It was held, that the judgment in this respect should be affirmed.

¹ *Whyte v. Manuf. Acc. Ins. Co.*, (1895) Q.B.D. 26 O.R. 153; 15 Can. Law Times (1895), 86; referred to *supra* § 27e, note.—See also *Hoven v. Empl. Liab. Ass. Corp.*, 67 N. W. Rep. (1896), 46. ² 2 L.N. 204 (Q.B. 1879).

³ *The G. T. R. Co. v. Beckett*, 16 S.C.R. 713, and see *G. T. R. v. Jennings*, 15 A.R. 477, 13 App. Cas. 800.—*Brown v. McRae*, 17 O.R. 712.

The measure of damages recoverable was the point in dispute in the case of

399. Action for calls—False entry by agent in subscription book—Alleged acquiescence by receipt of dividend.—The Stadacona Insurance Company, incorporated in 1874, employed local agents to obtain subscriptions for stock in the district of Quebec, such local agents to receive a commission on shares subscribed. At the solicitation of one of these local agents, F. X. C., intending to subscribe for five paid up shares, paid \$500 and signed his name to the subscription book, the columns for the amount of the subscription and the number of shares being at the time left in blank. These columns were afterwards, in the presence of appellant, filled in with the number of shares (50 shares) by the agent of the company, without F. X. C.'s consent. Having discovered his position, one of appellant's brothers, who had also subscribed in the same way, went next day to Quebec and endeavored, but ineffectually, to induce the company to relieve them from the larger liability. At the end of the year 1875, the company declared a dividend of 10 per cent on the paid up capital (*montant versé*) and the plaintiff received a cheque for \$50, for which he gave a receipt. In the

Blinn v. Dresden Mut. Fire Ins. Co. (1893), 85 Me. 389, which was brought before the Supreme Court of Maine. The policy and by-laws expressly limited the insurance to "two-thirds of the actual destructible value of the buildings," and the court decided that the assured was not entitled to recover more than that proportion, notwithstanding another condition which provided, that "the damage is to be paid in full, not exceeding the amount insured, and is to be estimated according to the fair value of the property at the time of fire." The court said, that the "language used in all these provisions is so plain that but one interpretation can be given to it: that in no event is the company liable for more than two-thirds the fair cash value of the property at the time of loss. It was, therefore, not a 'valued policy.'" The court also explained the word "damage," used in the condition relied on by plaintiff "the obvious meaning of which is that the fair cash value is to be ascertained, and the amount for which the company is liable is to be estimated therefrom."

See also *State Ins. Co. of Des Moines, Iowa v. Taylor* (1890), 14 Colo. 499, *vide index*, where the court said that, to arrive at the value at the time of the loss, "the original cost, the cost of a like building at the time of the trial, and the difference in value between the house burned and a new one by reason of age and use, are all proper subjects of enquiry."

In *Sun Fire Office of London v. Ayerst* (1893), 37 Neb. 184, the court approved an instruction to the jury that they should find the fair value of the property destroyed (household furniture and wearing apparel in actual use), and that such value was not what a junk shop or second hand dealer would give for them, or what they would bring under extraordinary circumstances or at a forced sale. Neither is it "to be understood that any fanciful notions of the value entertained by the owner are properly to be considered".... "this value, on the one hand, not to be swollen by a sentimental partiality of its owner, and, on the other, not to be subjected to the odium and suspicion generally incident to second hand clothing or furniture."

The views above expressed are not without support in other adjudicated cases involving the same question. *Vide Gere v. Ins. Co.*, 67 Iowa 272; 23 N. W. Rep. 137; 25 N. W. Rep. 159.—*Joy v. Ins. Co.*, 83 Iowa 12; s.c. 48 N. W. Rep. 1049.

following year the company suffered heavy losses, and, notwithstanding F.X.C.'s repeated endeavors to be relieved from the larger liability, brought an action against him to recover the third, fourth, fifth and sixth calls of 5 per cent on 50 shares of \$100 each, alleged to have been subscribed by F. X. C. in the capital stock of the company.

The court decided, Ritchie, C. J., *dubitante*, reversing the judgment of the court below, that the evidence showed the appellant never entered into a contract to take 50 shares; that the receipt given for a dividend of 10 per cent on the amount actually paid (*montant versé*) was not an admission of his liability for the larger amount, and he, therefore, was not estopped from showing that he was never in fact holder of 50 shares in the capital stock of the company.¹

400. Assessment upon interest.—It has also been a subject of dispute whether an insurance corporation is liable to be assessed upon the interest arising upon investments of their reserve fund, and where the County Court Judge had decided, on appeal from the Court of Revision, that the plaintiffs were liable under sec. 34, and sec. 2, sub-sec. 10, of the Consolidated Assessment Act, 55 Vic., ch. 48, although such interest had always been added to the reserve fund and re-invested as part of it, the plaintiffs brought an action to have the assessment declared illegal:—

It was held that, although the plaintiffs were bound by law to keep up the reserve fund upon a certain scale, the amount varying according to the values of the lives insured by them, as fixed by actuaries' tables, yet they were not bound to apply the income arising from the investments of the fund in keeping the fund at its proper level, but might make the necessary increase with any money whatever, and the Judge of the County Court had full jurisdiction and the matter was, therefore, *res judicata*.²

401. Jury giving an answer beyond their proper functions.—Where the jury, after answering a question proposed to them, add an expression of opinion, *e.g.*, when in an action for the amount of an accident policy which did not cover death resulting from fighting, wrestling or violating the law, the jury said, in

¹ Supreme Court of Canada. *Côté v. Stadacona Ins. Co.*, 6 S.C.R. 193.

² *Confederation Life Ass. v. Corp. of City of Toronto*, 24 O.R. 643; and see *Bain v. Aetna Ins. Co.*, 20 O.R. 6, *supra*.

answer to questions, that the deceased was fighting, wrestling and violating the law, but not as intended by the true interpretation of the policy, the court will reject that part of the answer which is beyond the proper functions of the jury, and give effect to the relevant portion of the answer.¹

402. Stamps on policies.—In an action for \$1.80, amount paid by plaintiff for stamps under the Act of the Quebec Legislature with regard to stamps on insurance policies, which Act was afterwards declared by the Privy Council to be unconstitutional, the defendants pleaded, first, that the stamps being transferable, the plaintiff should have produced them or have tendered them to defendants, so that the latter might claim the amount from the government. It was further pleaded that the defendants had paid the amount over to the government, acting, as it were, as the agents of the government, and had not profitted in any way by the payment, but simply did what they were required by law to do. Plaintiff answered and produced stamps to the amount claimed with his answer.

The court held, that the plaintiff had a good claim against the insurance company for the amount charged to him for the stamps, but as plaintiff had not produced the stamps with his action, he would have to pay costs.²

¹ *Turnbull v. Trav. Ins. Co.*, R. J. Q. 4 S. C. 398, referred to *supra* § 384.

² *David v. Stadacona Ins. Co.*, 3 L. N. 118. (S. C. 1890).

CHAPTER XXII.

LIMITATION OR PRESCRIPTION OF ACTIONS.

403. GENERAL REMARKS—LEGISLATIVE ENACTMENTS AND JURISPRUDENCE ON LIMITATION.

404. AMERICAN DECISIONS ON LIMITATION.

405. LIMITATION AS TO PLACE OF BRINGING SUIT.

403. General remarks—Legislative enactments and jurisprudence on limitation.—In Ontario, Manitoba and British Columbia, by statutory conditions, actions upon a fire insurance contract are absolutely barred unless commenced within one year from the loss.¹

In Quebec, there is no such limitation unless it is stipulated in the policy. It was formerly held that such a stipulation was inoperative,² but this decision has been overruled.³

The Quebec Court of Appeals in 1886 appeared to have doubts as to its validity;⁴ but in the following year they held it valid,⁵ and this last decision was confirmed by the Supreme Court of Canada.⁶

The object of the condition is not to foreclose a right and prevent a resort to the proper tribunal, but to compel a speedy resort and a termination of the controversy while the facts are fresh in the recollection of the parties and witnesses, and the proofs accessible. Claims made after they have become stale involve considerable difficulty.⁷

Where the covenant by the insurers is to pay a certain time after the loss, the real period within which the assured could sue

¹ 80 Vic., c. 36 (O.), s. 168, ss. 22.—R. S. M. 1891, c. 59, stat. con. 22.—B. C. Ins. Pol. Act, 1893, c. 12, stat. con. 22.

See also *infra* as to limitation in life and accident insurance in Ontario.

² *Wilson v. State Fire Ins. Co.*, 7 L. C. J. 223.

³ *Rousseau v. Royal Ins. Co.*, M. L. R. 1 S. C. 395.—*Cornell v. Lpl & Ldn & Globe Ins. Co.*, 14 L. C. J. 257. Q. B.

⁴ *Anchor Marine Ins. Co. & Allen*, 13 Q. L. R. 4.

⁵ *Allen & Merchants' Marine Ins. Co.*, M. L. R. 3 Q. B. 293.

⁶ *Ib.*, 15 S. C. R. 488. ⁷ *Porter's Laws of Ins.*, 177.

may by the limiting condition be virtually reduced to the interval between the day at which payment ought to be made and the last day of the period within which action must, by the condition, be brought, since the time for bringing the action, in the absence of special terms, will run from the happening of the event insured against, but the insured will not know, until after the time given to the company to pay, whether they intend to settle the claim or make it necessary for him to sue them.¹

But where the other conditions are such that a reasonable compliance with them is inconsistent with a compliance with the condition requiring suit to be brought within a specified time, the latter will not be allowed to defeat a recovery. Thus, where suit has to be brought within six months from the time of the loss, and the loss is not payable until sixty days after the adjustment, and the parties, in good faith and without objection, are occupied so long in adjusting the loss that sixty days from the date of the adjustment does not expire within the six months, a suit brought at the expiration of sixty days will be maintained.²

There was much controversy on the subject of this condition in England; but since the case of *Worsley v. Wood* (6 T. R. 710), it is settled law there that the condition is effectual and legally binding; and there is no doubt that it is so in Canada.

If the prescribed time be allowed to elapse without suit, there remains no longer a legal liability in any form.

It was said formerly, that the contract of insurance is of a peculiar description, resembling a wagering contract, in which the insurers for a small premium undertake to indemnify the party who suffers the loss; that the amount for which they may become responsible greatly exceeds the premium paid, and the liability depends upon a contingency over which neither party has any control; that, for whatever the insurer may eventually have to pay, he becomes liable by positive stipulation rather than upon any principle of natural justice growing out of an adequate consideration received, and that, so far as this liability exceeds the premium paid, it more nearly resembles a penalty than a simple debt, and this would more naturally fall into the class of cases in which statutes prescribing a time within which suit shall be brought,

¹ Porter's Laws of Ins., 178.

² May, 487, and see *Peoria Sugar Refg. Co. v. Can. Fire & Mar. Ins. Co.*, 12 A. R. 418 and other cases *infra*.

are construed as limitations upon the liability rather than mere denials of a remedy. This doctrine, however, is no longer applicable under the modern contract, in which the premium represents an adequate return for the risk.

It was intimated, however, in an American case, that such a limitation might not be upheld if the period within which suit must be brought be so unreasonable as to raise a presumption of imposition or undue advantage in some way.¹

As has been pointed out,² any variation of the Ontario, Manitoba or British Columbia statutory conditions must, to be valid, be held just and reasonable by the court.

The condition as to limitation may, however, be waived. Holding out hopes of an amicable adjustment, and generally any act of the insurer inducing delay, might be a waiver.³

¹ May, 482 & 488; & see *Cornell v. Lpl. & Ldn. & Globe Ins. Co.*, 14 L.C.J. 257 *supra*.

It has been said in the United States that the conditions, usual in policies of insurance of all kinds, limiting the period within which suits are to be brought upon them as to their construction, do not assimilate to the general statutes of limitation of suits; they are treated as part of the contract of insurance and the same rules governing the construction of other conditions in such contracts are applied, as, for instance, the court must confine the parties to the contract they have made and not modify or enlarge it to the extent to make a new contract for the parties. Speaking as to the validity of a condition of this kind, Mr. Justice Field said, in *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 398: "The conditions in policies requiring notice of loss to be given and proofs of the amount to be furnished the insurers within certain prescribed periods, must be strictly complied with to enable the insured to recover. Now, it is not perceived that the condition under consideration stands upon any different footing. The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. And it is not an unreasonable term that, in case of a controversy upon a loss, resort should be had by the assured to the proper tribunal whilst the transaction is recent and the proofs respecting it are accessible."

The courts generally have sustained the validity of such limitations.—(Beach, 1259).

The Nebraska Supreme Court, however, has held, that such a condition, the period being much less than that fixed by the statute of limitations of that state, was not binding on the insured unless it was embodied in the application for the policy, or had a consideration to support it.—(*Barnes v. McMurty* (1890), 29 Neb. 178).

And the North Dakota Supreme Court has held that such a condition in policies issued in Dakota upon property therein, though it would be upheld at common law was void under their statute, which declares that "every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."—(*Johnson v. Dakota F. & M. Ins. Co.* (1890), 1 N.D. 167).

² *Supra* § 247, page 341.

³ See *infra*.

The question of a waiver of statutory condition 22 has been discussed at length in *Cousineau v. City of London Fire Ins. Co.*, 15 O.R. 329, *infra*, page 676.

In Ontario, an action under a contract of insurance of the person¹ may be commenced at any time within a year after the happening of the event insured against; but if it is shown to the satisfaction of a judge of the High Court, or the Master in Chambers, that there was a reasonable excuse for not commencing the action within that period, the limitation may be extended for a further term of six months.

Under the general rule in Quebec, a claim for insurance under a policy is prescribed in five years.

It has been held in Quebec, that when a company absolutely repudiates the insurance effected by the deposit receipt, and when the policy has not issued, the right of action accrues at once, and there is no necessity for giving the preliminary notices and conforming to the delay and other conditions precedent in case of loss endorsed upon the company's policies.⁴

The preliminary proofs under a fire policy, made after the fifteen days within which the condition endorsed thereon required the same to be furnished, are sufficient when the condition states after the provision as to the 15 days that until such proofs are made, no right of action shall accrue.⁵

Mackay, J., in rendering judgment in this case remarked that, if the word "unless" had been used instead of the word "until" the 15 days would have been *a terme de rigueur*.⁶

It was held in one Quebec case, that where before the expiry of the 90 days delay allowed by the condition of the policy an insurance company positively refuses to pay a claim under it, suit may be brought upon the policy without awaiting the termination of such delay.⁷

But the Supreme Court of Canada have ruled against this pretension.⁸ The conditions on a policy never delivered to the assured until after loss cannot, however, bind him.⁹

It has been considered in Ontario that a condition, that any action on the policy should be barred "unless commenced within

¹ 60 Vic., c. 36 (O.), s. 2, ss. 36. (It is evidently owing to a clerical error that subsection 34, instead of 36, of section 2 has been referred to in section 147 of the Ont. Ins. Act, 1897).

² *Ib.*, s. 148, ss. 2. ³ Jones v. Sun Mut. Ins. Co., 7 R.L. 387.

⁴ Goodwin & Lancashire Ins. Co., 18 L.C.J. 1, and see *supra*.

⁵ Lafarge v. Liverpool & London & Globe Ins. Co., 17 L.C.J. 237. ⁶ *Ib.*, 240.

⁷ Citizens Ins. Co. v. Boisvert, 11 Q.L.R. 377.—14 R.L. 156.

⁸ Mut. Fire Ins. Co. of Wellington v. Frey, 5 S.C.R. 81, *supra*.

⁹ Ansley v. Watertown Ins. Co., 14 Q.L.R. 183.

the term of six months next after the loss or damage should have occurred," was an unreasonable one, as another condition provided that the company should have sixty days for payment after completion of proofs of loss.¹

And in another case, on the same condition, it was held, affirming the decision of *Boyd, C.*, that this condition must be considered to refer to the date of the destruction by fire, and not to the date at which the cause of action arose.²

In another case it was objected that the action was premature, because by a condition of the policy sixty days was given for the payment of a claim, and the action was brought within such period; but it was held that, as the policy herein was only subject to the statutory conditions by which the period is thirty days, the objection could not be sustained.³

Where the company having refused payment of the insurance, an action was commenced to recover the amount after the lapse of more than thirty days from completion of the proofs of loss, but less than sixty days thereafter, which by a variation and addition to the statutory conditions indorsed on the policy was stipulated for: It was held, that the stipulation that no action should be brought until the expiry of sixty days after proof of loss was not a just or reasonable variation of the statutory conditions. Per *Burton, J. A.*:—The words of the 17th statutory condition being that the loss should not be payable until thirty days after completion of the proofs of loss, created a privilege in favor of the company, and the statute does not contemplate any further extension, but simply that the company shall be entitled to that delay unless under their charter or by agreement that period is shortened.⁴

And the Superior Court of Canada, ruling on *Stat. Con. 17*, have confirmed this and held that this is a privilege accorded to the company, and while the time may be further limited by agreement, it cannot be extended. Further, that a variation of the condition, by inserting a clause in the policy extending the time to sixty days, is not a variation by agreement of the parties, nor is such varied condition a just or reasonable one.⁵

¹ *Peoria Sugar Ref. Co. v. Canada F. & M. Ins. Co.*, 12 A.R. 418, and see *supra*.

² *Ib.*

³ *Hartney v. North British Fire Ins. Co.*, 13 O.R. 581.

⁴ *Smith v. City of London Ins. Co.*, 11 O.R. 38. 14 A.R. 328.

⁵ *S. c. sub nom. City of London Fire Ins. Co. v. Smith*, 15 S.C.R. 60.

In another case, the plaintiff sued upon an insurance policy for a loss occasioned by a fire, which took place on the 28th March, 1886. One of the statutory conditions of the policy provided that every action thereunder should be absolutely barred unless commenced within one year after the loss occurred. The action was not commenced until the 12th July, 1887. After the plaintiff had put in proof papers in reference to the loss, the defendants from time to time up to 11th May, 1887, requested the plaintiff to procure and furnish additional particulars concerning the claim, and the claim was completed more than sixty days prior to the commencement of the action, as required by one of the conditions in variation of the statutory conditions which provided that the loss should not be payable until sixty days after the completion of the claim. It was held, per Armour, C. J., that the conduct of the defendants in requesting the plaintiff to procure and furnish additional particulars and thereby putting him to loss of time, trouble and expense, was a waiver of and precluded the defendants from setting up the statutory condition limiting the time for bringing the action. Per Street, J., that in the absence of any agreement not to insist upon the condition there could be no waiver, unless the defendants had so acted to estop themselves from taking advantage of the condition; there was nothing in the conduct of the defendants equivalent to an assertion on their part that they would not insist upon their rights under the condition; and they were, therefore, entitled to the benefit of it.¹

The maxim *contra non valentem agere non currit præscriptio* does not apply to the one year's prescription stipulated in a policy of insurance.²

It has been held in Quebec that, where an action was brought on a policy of fire insurance and the defendants pleaded the prescription of one year under the policy, an unaccepted tender of money in settlement was not an interruption of such prescription.³

404. American decisions on limitation.—The question of when limitation under an insurance contract begins to run or under

¹ *Cousineau v. City of London Fire Ins. Co.*, 15 O.R. 329 Q.B.D.—*Cornish v. Abington*, 4 H. & N. 548, and *Thomas v. Brown*, 1 Q.B.D. 714 discussed, and see *McIntyre v. National Ins. Co.*, 5 A.R. 580, & *Anderson v. Saugeen Mut. Fire Ins. Co. of Mt. Forest*, 18 O.R. 335.

² *Privy Council, Browning & Prov'l Ins. Co.*, 5 P. C. App. Cas. 283.

³ *Bell v. Hartford F. Ins. Co.*, 1 L.N. 100.

Prescription was also set up in defence in the case of *Prevost v. Scott. Union & Nat. Ins. Co.*, *supra* § 371.

what circumstances the clause referring to this matter must be considered waived, and similar questions, have often been ventilated in American courts. A reference to a few cases will suffice to illustrate the trend of judicial opinion on this subject in the United States.¹

¹ In *McFarland v. Railw. Off. & Empl. Acc. Ass.*, 38 Pac. Rep. (1894), 347, limitation began to run at the death of assured, and not at the time at which the right of action accrued.

Where a policy insuring against liability for injuries to third persons provided that, in case the assured should be sued by a person injured, an action by the assured on the policy must be brought within six months from the "termination" of the action by the injured person, it was held, that the "termination" of such action, in which judgment for plaintiff therein had been affirmed on appeal, was on filing of the mandate of the Appellate Court, and not on the payment of the judgment.—*People v. Amer. Steam-Boiler Ins. Co.—In re Gendron Iron Wheel Co.*, 35 N. Y. Suppl. (1895), 322; 69 N. Y. St. Rep. (1895), 721.

In *Murdock v. Franklin Ins. Co.* (1889), 33 W. Va. 407, it was held, that limitation as to suit began to run at the close of the sixty days allowed the company for payment, not from the actual loss.

The same view was taken in *Case v. Sun Ins. Co.* (1890), 83 Cal. 473, where the Supreme Court of California held, that the twelve months limitation did not begin to run until the loss was payable and the right of action accrued. Further, that if the assured complied with all the requirements of the policy as rapidly as he was able, and was unable to complete the requirement exacted by the insurance company until more than twelve months had elapsed after the fire, his cause of action was not barred by the provisions of the policy, on the ground that the suit was brought fourteen months after the fire.

But in *Travelers Ins. Co. v. California Ins. Co.* (1890), 1 N. D. 151, the Supreme Court of North Dakota has held that, where the policy provides that action upon it must be brought within a specified time after the loss occurs, the limitation runs from the date of the fire, although under other provisions of the policy the cause of action does not accrue until some time after the fire. And there is a similar recent holding in N. Y. (*King v. Watertown Ins. Co.* (1888), 47 Hun. 1).

In the above case of *Travelers Ins. Co. v. Calif. Ins. Co.*, where the court took a position *contra* that of a majority of the adjudications in the United States, the question was fully discussed. The court said, *inter alia*:—"Those cases rest upon the alleged necessity of harmonizing conflicting provisions. The policies provide that the loss should not be payable until a specified number of days after the proofs of loss. There is no conflict between such a provision and another part of the same policy requiring the action to be brought in twelve months or any other time, after loss shall have occurred, provided, of course, a reasonable time is left after the cause of action has become perfect, in which to sue. The error which appears to this court to lie at the foundation of these decisions is the assumption that the insurance company intended to give the insured the full time specified, during every moment of which he might institute his action. What right has any tribunal to find hidden somewhere in the contract a privilege to have the full time to sue after the cause of action has accrued, when the policy gives it only from the time the loss occurs? There are two distinct provisions—one that the insured shall not sue before a certain time, and another that he shall not sue after a certain time. These do not clash. They merely necessitate the construction that the intention was to give the insured such period in which to maintain his action after he could sue as would be left after deducting from the time limited the time which must elapse before the right to sue could accrue. But we find in these cases this extraordinary reasoning: they assert that

this doctrine will often kill the action before it could have life. The answer is short and simple; every limitation in a contract is void which does not leave the plaintiff a reasonable time in which to sue after his right to sue has become perfect. When an insurance company has declared that a suit must be brought within forty days after loss has occurred and that no action shall be maintained until thirty days after proof of loss, the duty of the court is, not to interpolate into the contract a provision that the limitation runs from the date the cause of action accrues, in place of one expunged by the same process, to wit the provision that the time runs from the time the loss occurs, which is the date of the fire, but the court should invoke against the company the rule that a right of action shall not in effect be destroyed by a limitation which leaves the plaintiff an unreasonably short time to sue after his cause of action has accrued and declare the limitation clause void. If other provisions of the policy make it appear that in every case a reasonable time will not be left after the right to sue has become perfect, the limitation is void. If acting in good faith and with all proper diligence, it transpires in any particular case that other provisions of the policy to be complied with as conditions precedent to a right of action could not be performed in time to leave a reasonable time thereafter in which to sue, the limitation is inoperative in such a case; and if the company has induced the insured to believe that the loss will be paid, or that the limitation will not be insisted on, until it is too late to sue, the limitation is waived. Thus, the insured is fully protected by the application of known and established principles. The contract is construed as it is written, and the time when the limitation begins to run, if at all, is fixed and not uncertain. In *Johnson v. Ins. Co.*, 91 Ill. 92, the limitation provision required the action to be brought within twelve months after the "loss occurred," and it was declared that no action should be commenced until sixty days after proof of loss. Said the court: "The two clauses, considered together, obviously provide that the company shall have sixty days within which to make payment after notice and proof of loss, but in no event should a suit or action be commenced after the expiration of twelve months from the date of the fire producing the loss. Any other meaning attached to the language, it seems to us, would be strained, unreasonable, and in direct violation of the plain intention of the parties clearly expressed." To same effect are *Ins. Co. v. Wells*, (Va.) 3 S. E. Rep. 349; *Chambers v. Ins. Co.*, 51 Conn. 17.—*Chandler v. Ins. Co.*, 21 Minn. 85, apparently supports this view; and this applies to a second action where the first has been dismissed as premature.—(*Hocking v. Howard Ins. Co.* (1889), 130 Pa. St. 170.)

In *Suggs v. Trav. Ins. Co.* (1888), 71 Tex. 579, it was declared that the exceptions in the statutes of limitations in favor of minors do not affect the agreements in the policy, and minor beneficiaries, by such a clause, are also bound to bring an action within the time agreed upon in the policy.

In *Cooper v. U. S. Mut. Ben. Ass.* (1892), 132 N. Y. 334, the Court of Appeals of New York has construed the limitation in accident policies of suits upon them, that they be commenced within "one year from the time of the alleged accidental injury" as follows:—"It will be observed that provisions are made in the certificate for two different persons who, upon the happening of the events specified, may have a right of action against the association. One provision is in favor of the insured, who may recover during his lifetime the amounts provided for his disability resulting from the accidental injury received. The other is to his wife, which is for the injuries which she suffers by reason of his death resulting from such accident. The accident received by the insured did not injure the wife or give her a right of action until death ensued. So far as she is concerned, the infliction of the wound is but the beginning and the death is the completion of the injury. Her suit must be "commenced within one year from the time of the alleged accidental injury;" in other words, within one year from the time of the injury to her, which was the death of her husband as the result of the accident. But this decision, though supported by precedent, seems to stretch the construction too far against the insurer.

Limitation was held waived in *Ins. Co. v. Brodie*, (1889), 52 Ark. 11, the com-

pany's agent having led the assured to believe that the loss would be paid without a suit; and in *Horst v. City of London F. Ins. Co.* (1889), 73 Tex. 67, the company having recognized liability by requiring no adjustment or further proofs of loss and promising to pay on determination of garnishment proceedings by creditors of assured.

But in *King v. Watertown Fire Ins. Co.* (1888), 47 Hun. 1, payment by the company to a mortgagee was held not to be a waiver of the limitation clause.

And in *Law v. New England Mut. Acc. Ass.* (1892), 84 Mich. 266, where the insurer notified the holder of the certificate five months before the expiration of the year allowed for bringing suit, that it declined to pay the claim and that "it would be better to let the courts decide this matter," it was held that a suit brought after the expiration of the year was brought too late.—See also *Shackett et al. v. People's Mut. Ben. Soc.*, 25 Ins. L. J. (1896), 153.

The Illinois Supreme Court, in a well considered case, *Allemannia F. Ins. Co. v. Peck* (1890), 133 Ill. 220, has affirmed the rules of law given by the court on the trial of the case, upon the subject of estoppel to claim a bar to the action by reason of the limitation in the policy as to the time of bringing suit thereon. In their opinion they well express the state of the law upon authority in the following words:—"The main propositions which the insurer sought, without success, to have embodied in the instructions were that, to show a waiver by the insurer of the limitation clause in the policy, it was incumbent upon the assured to prove that their delay in bringing suit was at the special instance and request of the insurer; and also, that such proof could only be made by positive evidence, and could not be inferred. That such is not the law is clearly established by the authorities. Thus, in *Peoria F. & M. Ins. Co. v. Whitehill*, 25 Ill. 466, where the question arose in this state for the first time, the rule was laid down as follows:—"Where an insurance company shall by fraud or by holding out reasonable hopes of an adjustment, deter a party assured, being under such a condition to sue, from commencing his suit, he honestly confiding in the pretences and promises of the insurer, the condition would be no bar."

This statement of the law has been cited with approval in various subsequent cases:—*F. & M. Ins. Co. v. Chesnut*, 5 Ill. 111; *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; *Home Ins. Co. v. Meyer*, 93 Ill. 271. The same doctrine obtains in other states. In *Martin v. State Ins. Co.*, 44 N. J. L. 485, it is said:—"If the delay to bring suit is a result to which the company mainly contributed by holding out hopes of an amicable adjustment, the company cannot be permitted to take advantage of the delay under the limitation clause of the policy." In *Mickey v. Burlington Ins. Co.*, 35 Iowa 174, an instruction was given to the jury holding that, if the plaintiff delayed bringing suit after the expiration of six months in consequence of inducements held out by the defendant's officer, causing him to believe that the loss would be paid or adjusted without suit, this would operate to remove the bar created by the condition of the policy requiring an action thereon to be brought within six months after the loss. The court, in sustaining this instruction, said:—"A course of conduct on the part of defendant, or representations of its officers, which would give reasonable ground upon which plaintiff did in fact base the belief that his claim would be settled, would stop the defendant to set up the limitation provided by the policy. It would be contrary to justice for defendant to hold out the hope of an amicable adjustment of the loss, and then be permitted to plead this very delay, which was caused by its own representative, as a defence to the action when brought." See also: *St. Paul F. & M. Ins. Co. v. McGregor*, 63 Tex. 399; *Ripley v. Aetna Ins. Co.*, 29 Barb. 552; *Barnum v. Mer. F. Ins. Co.*, 97 N. Y. 188; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Peoria Ins. Co. v. Hall*, 12 Mich. 202.

For a discussion of the limitation clause in the "Michigan Standard Fire Policy," see *Steele v. German Ins. Co. of Freeport* (1892), 93 Mich. 81.

In *Metrop. Acc. Ass. v. Froiland*, 25 Ins. L. J. 595 (1896), where the beneficiary was ignorant of the by-law requiring suit on the policy to be brought within thirty days after a refusal of a company to pay a claim, and the officer refused a request for

405. Limitation as to place of bringing suit.—In the case of *Slocum v. Western Ass. Co.*,¹ it appeared that there was a provision in a policy of marine insurance, issued by a Canadian company, that “if the assured proceed at law or equity, by suit or action, to recover the whole or any part of the sum assured by this policy, such suit or action shall be brought and prosecuted in Her Majesty’s Court in the city of Toronto, and not elsewhere.” A total loss having occurred, a libel in admiralty was instituted by the assured against the company in the Federal Court for the Southern District of New York, and a motion was made to dismiss the libel upon the ground that this court, if not without jurisdiction of the cause, should, as a matter of discretion, decline to entertain it in the face of the above stipulation. The motion was denied, the stipulation being held invalid. Brown, J., said:—“The authorities, I think, sustain the general doctrine that a stipulation inserted in a contract, limiting the remedy for a breach of the contract to a particular forum, is not a valid stipulation. Several cases have held that such a stipulation, distinguishing between the different courts of the same county or state, will not be recognized or regarded as valid there. I do not see why any greater effect should be given to it abroad, or as between the courts of the country of the contract and any appropriate foreign tribunal. *Steam Shipping Co. v. Lehman*, 39 Fed. 1104; *Scott v. Avery*, 5 Hl. Cas. 811; *Nute v. Ins. Co.*, 6 Grey 174; *Amesbury v. Ins. Co.*, 6 Grey, 596; *Nevins v. Ins. Co.*, 25 N. R. 22; *Bartlett v. Ins. Co.*, 46 N. E. 500; *Ins. Co. v. Routledge*, 7 Ind. 25; *Reichard v. Ins. Co.*, 31 M. O. 518. A court of admiralty may doubtless, in

a copy of the by-laws, and in reply to a question as to the time in which suit might be brought answered “three months” (the maximum limit in any case), the limitation as to the thirty days was thereby waived. 59 Ill. App. 522, affirmed.

And in *Mut. Res. Fund Life Ass. v. Tolbert*, 33 S. W. Rep. (1896), 295, where the petition averred quibbling over alleged defects in proofs of death, leading plaintiff to understand that the matter would be adjusted when such defects were cured, with a fraudulent intent to allow such year to expire, the evidence showed that defendant’s objections to the proofs of death furnished were such that it would be hard to attribute to them any other motive than the fraudulent purpose of allowing such year to expire; that in addition to repeated letters written by defendant demanding purely formal changes in the proofs of death, without intimating dissatisfaction with the merits of the claim, defendant’s vice-president stated to plaintiff’s agent that plaintiff had the blanks necessary to be filled up, and if they were intelligently filled in he had no doubt that the matter could be arranged. The court decided, that the evidence was sufficient to establish a waiver of the condition of the limitation.

¹ 42 Fed. Rep. 235 (1890).

its discretion, decline to entertain jurisdiction in maritime cases arising abroad, where none of the parties are resident here. Suits for the wages of foreign seamen involving detention of the ship, and brought here without justifiable reason, are declined. But, where the controversies are *communis juris*, special reasons should appear for declining jurisdiction. . . . The libellants are all citizens of this country; two of them reside in this state, and one in this district. No special circumstances are shown as respects the particular matter in litigation, or the convenience of witnesses, why the determination of the libellants' rights should be had in Toronto rather than in New York. Though the policy was formally and technically issued at Toronto, the whole business was with citizens of the United States, through brokers belonging here, upon freight upon a vessel of the United States, and in respect to a voyage between South American ports. These circumstances do not present, so far as I perceive, any equitable grounds for refusing, as a matter of discretion, to entertain a suit brought lawfully here to enforce an apparently lawful demand. On the contrary, this country, where the libellants reside and where the business was in effect procured and its profits realized, seems to me to be the more appropriate forum.

CHAPTER XXIII.

FOREIGN COMPANIES IN CANADA.

406. GENERAL REMARKS ON THE STATUS OF FOREIGN COMPANIES.

407. WHEN CONTRACT BY AGENT OF FOREIGN COMPANY IS ULTRA VIRES.

408. JURISDICTION OF CANADIAN COURTS RESTRICTED TO OBLIGATIONS IN THE DOMINION.

409. PAYMENT OF PREMIUMS WHEN COMPANY HAS NO OFFICE IN CANADA.

410. ASSESSMENT UPON NET PROFITS OF AGENT.

411. DEPOSIT WITH BANK—FAILURE OF BANK—ALLEGED PREROGATIVE OF CROWN.

412. CLAIM FOR REBATE BY ONE OF TWO JOINT-INSURERS.

413. NON-PAYMENT OF NOTE GIVEN FOR REINSURANCE PREMIUMS—RE-DRESS OF REINSURING COMPANY.

414. DISTRIBUTION OF DEPOSIT ON BEHALF OF CANADIAN POLICY HOLDERS, ALTHOUGH WINDING-UP PROCEEDINGS ARE PENDING IN ENGLAND.

415. SECURITY FOR COSTS.

416. ATTACHMENT IN GARNISHMENT—PAYMENT INTO COURT.

417. FOREIGN INSURANCE COMPANIES IN THE UNITED STATES.

406. General remarks on the status of foreign companies.—

There is no doubt that under international law a corporation duly created according to the laws of one state may sue and be sued in its corporate name in the courts of other states.¹

It has been said that, as no state can validly authorize a body corporate to transact business out of its own territory, no corporation can sue in a foreign country on a contract entered into there.²

But, if carefully examined, these cases only decide what is unquestionably true, viz., that a corporation formed to carry on a particular business in one country exceeds its powers if it carries on a similar business out of that country.³

The true question is not whether one state can legally grant powers of contracting, etc., in another state, but to what extent does one state recognize the acts of another. The right of a corporation to sue in a foreign country, as well as its right to contract in a foreign country, are both based not on the law of the state

¹ The Dutch West India Co. v. Moses, 1 Str. 611. Lindley on the Law of Companies, 5th ed. p. 909, and C. P. 79.

² Bank of Montreal v. Bethune, 4 U.C. Q.B. 341.—Genesee Mut. Ins. Co. v. Westman, 8 U.C. Q.B. 487.—Union Rubber Co. v. Hibbard, 6 U.C.C.P. 77.

³ Lindley, 5th ed., p. 910, note (k).

creating the body corporate, but on the extent to which the foreign country chooses to recognize that law. This rule of law exists by the comity among states.¹

Foreign corporations must satisfy the requirements of the Insurance Act of Canada and the provincial legislative enactments before they are entitled to transact the business of insurance in the provinces of the Dominion.²

407. When contract by agent of foreign company is ultra vires.—A contract of insurance alleged to have been made in Montreal by an agent of an insurance company incorporated by the laws of the State of New York, whose charter and by-laws provided that it could only contract in New York, and by the president and vice-president, was held in Quebec wholly null and void.³

408. Jurisdiction of Canadian courts restricted to obligations in the Dominion.—Foreign insurance companies doing business in the city of Montreal can be sued before the courts of the Dominion of Canada for such obligations or responsibilities only as they have assumed in Canada.⁴

409. Payment of premiums when company has no office in Canada.—Where the question was whether the amount of insurance claimed on the life of deceased was forfeited by the non-payment of the premium, the evidence showed that the company, after the 1st May, 18—, had ceased to do business in Quebec and to have an agent there to whom payment could be made, and the plaintiff urged that it was not his duty to go to England, where

¹ Morawetz, *Law of Private Corporations*, § 960.

Chief Justice Taney said in *Augusta v. Earle*, (13 Pet. 519, 592):—"We think it well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another and sue in its courts, and that the same law of comity prevails among the several sovereignties of the Union."

And Justice Harlan said in *Union v. Yount* (101 U.S. 350):—"In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that the corporation of one state, not forbidden by the law of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing either in the direct enactments of the latter state or by its public policy to be deduced from the general course of legislation or from the settled adjudications of its highest courts.

² See Ont. Ins. Act, 1897.—R. S. Q., 1888.—R. S. M., 1891.

³ *Redpath et al. v. Sun Mut. Ins. Co.*, 14 L. C. J. 90.

⁴ *Richelieu & Ont. Nav. Co. v. Phoenix Ins. Co. of Brooklyn*, M. L. R. 2 S. C. 192, and 9 L. N. 210, 1886.

the headquarters were, to pay the amount. The court decided that, under the circumstances, the contention of the plaintiff should be maintained and judgment must go against defendants.¹

410. Assessment upon net profits of agent.—By section 126 of the St. John City Assessment Law, 1889, 52 V., c. 27, the agent or manager of any life insurance company doing business out of the province, is liable to be assessed upon the net profits made by him as such agent or manager from premiums received on all insurances effected by him ; and the better to enable the assessors to rate such company, the agent or manager is required to furnish at a certain time in each year a statement under oath, in a prescribed form, setting forth the gross income and particulars of the losses and deductions claimed therefrom, and showing the ratable net profits for the preceding year.

By the form prescribed, the deductions to be made from the gross income consist of re-insurance, rebate, etc., actually paid, and amounts paid on matured claims on policies issued by such agent or manager. In the form presented by the agent of a life insurance company in St. John, N.B., there was no amount entered for deductions of the latter class, but instead thereof, an item was inserted of "75 per cent. of premiums deposited with government for protection of policy holders," which was an addition to the form. The statement showed that the deductions exceeded the gross income, leaving no net profits to be taxed. The assessors, on receiving this statement, disregarded the result shown thereby and assessed the agent on net profits for the year of \$6300. A rule *nisi* for a *certiorari* to quash the assessment was obtained, in support of which it was shown by affidavit that the amount required to be deposited with the Dominion Government by the company assessed was about 75 per cent of the premiums received, and that the amount of such deposits from time to time returned to the company was applied for the benefit of policy holders and formed no part of the income profits of the company. The Supreme Court of New Brunswick discharged the rule and refused to quash the assessment on the grounds that the government deposit was part of the income of the company held in reserve for certain purposes and formed no part of the expenditure, and that the agent had no right to strike out certain requirements of the

Dorion v. Positive Life Ass. Co., 1 L.N. 268.

form prescribed and substitute different statements of his own. It was held, reversing the decision of the court below, Fournier and Taschereau, JJ., dissenting, that the agent was justified in departing from the form to show the real state of the business of the company, and the deposit was properly classed with the deductions, and the assessors had no right to disregard the statement and arbitrarily assess the company as they did.¹

411. Deposit with bank—Failure of bank—Alleged prerogative of crown.—An insurance company, in order to deposit \$50,000 with the Minister of Finance and receive a license to do business in Canada according to the provisions of the Insurance Act (R. S. C., c. 124), deposited the money in a bank and forwarded the deposit receipt to the Minister. The money in the bank drew interest which, by arrangement, was received by the company. The bank having failed, the government claimed payment in full of this money as money deposited by the Crown.

It was held, reversing the judgment of the court below, Strong, J., dissenting, that it was not the money of the Crown, but held by the Finance Minister in trust for the company; it was not, therefore, subject to the prerogative of payment in full in priority to other creditors.²

412. Claim for rebate by one of two joint-insurers.—J. M. and F. M., his wife, were jointly insured in the defendant's company, whose deposit was being administered under R. S. O. (1877), c. 160, ss. 21, 23. On 4th February, J. M., without the assent of F. M., signed and sent to the receiver a claim for rebate as empowered under that Act. No acknowledgment of the receipt of this claim was given by the receiver, who, on 27th February, sent J. M. and the other policy holder a circular notifying them of an agreement for re-insurance, and that if they objected thereto and desired to claim for rebate, they were to do so before 15th March. On 24th February the property was burnt, and J. M. forthwith claimed for the whole loss. It was held, that neither J. M. nor F. M. were bound by the former's claim for rebate. That it was not a release, but an invalid attempt by one to exercise a joint statutory power; or else an attempt to make a new contract which was not

¹ Supreme Court of Canada, *Peters v. City of St. John*, 21 S. C. R. 674.

² Supreme Court of Canada, *Liquidators of the Maritime Bank v. The Queen*, 27 S. C. R. 657.

authorized by one of the parties, and was not accepted by the receiver before the loss occurred. Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other.¹

413. Non-payment of note given for re-insurance premiums—Redress of re-insuring company.—Pending administration of the deposit of the U. Insurance Company under R. S. O. (1877), c. 160, ss. 21, 22, and after the completion of the receiver's schedule prescribed by the Act, a re-insurance was effected with the A. Insurance Company of all the U. company's risks, in consideration of which the U. company gave the A. company its note. This note not being paid at maturity, the A. company sought to be placed on the dividend sheet of the U. company for dividends accrued or to accrue. It was held, that it was entitled to the relief asked, for properly viewed the subject of the claim existed before the schedule, though in a different shape, since by the arrangement with the A. company, made with the assent of persons entitled to rebates, the liability of the U. company in respect to rebates was greatly reduced, and to that extent the A. company should be taken to be subrogated to the position of the policy-holders of the U. company.²

414. Distribution of deposit on behalf of Canadian policy-holders, although winding-up proceedings are pending in England.—Canadian policy holders petitioned for distribution of the deposit made by the company, a foreign corporation, with the Minister of Finance under 31 Vict., c. 48 (Dom.) and 34 Vict., c. 9 (Dom.), the company being insolvent. It was decided that they were entitled to the relief asked, notwithstanding that proceedings to wind up the company were pending before the English courts. The above Acts are not *ultra vires* of the Dominion Parliament. For any balance of their claims not covered by the deposit, Canadian policy holders would be entitled to rank upon the general assets of the company.³

The definition of "Canadian policy" and "policies in Canada" in 34 Vict., c. 9, s. 1 (Dom.), is not to be interpreted to mean that

¹ Clarke v. Union Fire Ins. Co.—McPhee's Claim, 6 O.R. 635.

² Clarke v. Union Fire Ins. Co.—Claim of the Agricultural Fire Ins. Co. of Watertown, New York, 6 O.R. 640.

³ Re Briton Medical and General Life Ass'n, 12 O.R. 441, and see *infra* § 418.

the deposit is only for the security of policy holders whose policies were issued after the deposit was made and license to transact business in Canada obtained.¹

415. Security for costs.—In the case of *Standard Life Ass. Co. v. McShane*,² a motion was made for security for costs. The court granted the motion, holding that the plaintiff is a foreign corporation. The Quebec Statute, 1888, chapter 120, which had been cited as constituting the plaintiff a corporation in this province, declared formally in section 6, that nothing in the Act should be construed or taken to incorporate the company.

416. Attachment in garnishment—Payment into court.—In a case³ where the amount of a life insurance policy was seized by attachment in garnishment in the hands of the company for a debt due by the deceased, and the company objected that the policy was payable in England, it was held, that upon such seizure the company could be compelled to pay the amount into court here, and that even where the insurance was effected at another agency beyond the jurisdiction of the court.

417. Foreign Ins. Cos. in the United States.—The *status* of foreign corporations doing business in the following states of the Union has been discussed in recent cases, viz., Michigan,⁴ Oregon,⁵ New York,⁶ Arkansas,⁷ Indiana,⁸ Iowa,⁹ Ohio,¹⁰

¹ Re Briton Medical and General Life Ass'n, 12 O. R. 441.

² Superior Court, Montreal, 13 Oct., 1897; not yet reported.

³ Chapman v. Clarke & Unity Life Ins. Ass., 3 L. C. J. 159.

⁴ Imperial Life Ins. Co. v. Hambitzer (1893), 95 Mich. 513.—Hartford Fire Ins. Co. v. Raymond (1888), 70 Mich. 485, 501, s. c. 38 N. W. Rep. 474.—People v. State Com'r of Insurance (1872), 25 Mich. 321.—Employers Liability Ass. Co. v. Com'r of Ins. (1887), 64 Mich. 614.

⁵ Hachemy v. Leary (1885), 12 Or. 40.

⁶ O'Neill v. Mass. Ben. (1892), 63 Hun. 292.—Griesa v. do. (1891), 15 N. Y. Suppl. 71.—Laffin v. Travelers Ins. Co. (1890), 12 N. Y. 713.—Emp. Liab. Ass. Corp. v. Emp. Liab. Ins. Co. (1891), 16 N. Y. Suppl. 397.—People v. Gibbert (1887), 44 Hun. 522.—Lancash. Ins. Co. v. Maxwell (1889), 5 N. Y. Suppl. 399.—People v. Justices, etc. (1889), 11 N. Y. Suppl. 773.

⁷ Am. Cas'y. Co. v. Lea (1892), 53 Ark. 533.—Ry. Co. v. Fire Ass'n (1891), 55 Ark. 163.—Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co. (1890), 41 Fed. Rep. 643, and see 139 W. S. 223.

⁸ Diamond Plate Glass. Co. v. Minn. Mut. Fire Ins. Co. (1892), 55 Fed. Rep. 27.—Wiestling v. Warthin (1890), 1 Ind. App. 217, *infra*.—State Ins. Co. of N. A. (1888), 115 Ind. 257.

⁹ Pennypacker v. Cap. Ins. Co. (1890), 80 Iowa 56.—State v. Fld. & Cas. Ins. Co. (1889), 77 Iowa 648.—State v. Miller (1885), 66 Iowa 26.—Eq. Life v. Board of Eq. of Des Moines (1888), 74 Iowa 178.

¹⁰ State v. Western Union Mut. Life Ins. Co. (1890), 47 Ohio St. 187.—Cross v. Armstrong (1887), 44 Ohio St. 613.—State v. Reinmund (1887), 45 Ohio St. 214.

Missouri,¹ Pennsylvania,² New Hampshire,³ Vermont,⁴ Illinois,⁵ Massachusetts,⁶ Nebraska,⁷ Tennessee,⁸ Wisconsin,⁹ Connecticut,¹⁰ Kansas,¹¹ Minnesota,¹² Alabama,¹³ Indiana,¹⁴ Georgia,¹⁵ Maryland,¹⁶ Texas,¹⁷ Maine¹⁸ and Louisiana.¹⁹

¹ *Equitable Life Ass. Society v. Clements* (1891), 140 W.S. 226.—N. Y. Life Ins. Co. v. Stone (1890), 42 Mo. App. 383.—May on Ins. § 500.—*Dongan v. Sun Fire Office of London* (1890), 39 Mo. App. 676.—*City of St. Joseph v. Ernst* (1888), 95 Mo. 360.

² *Commonwealth v. Biddle* (1891), 139 Pa. St. 605.—*Do. v. Morningstar* (1891), 144 Pa. St. 103.—*Aetna Fire Ins. Co. v. City of Reading* (1888), 119 Pa. St. 417.

³ *Connecticut River Mut. Fire Ins. Co. v. Way* (1883), 62 N. H. 622, and *Ins. Co. v. Whipple*, 61 N. H. 61.

⁴ *Lycoming Fire Ins. Co. v. Wright* (1888), 60 Vt. 515.

⁵ *Watertown Fire Ins. Co. v. Rust* (1892), 141 Ill. 85.—*Mut. Fire Ins. Co. v. Swigert*, (1887), 120 Ill. 36, s.c. 11 N. E. Rep. 410.—*Germania Ins. Co. v. Swigert* (1889), 128 Ill. 237.—*City of Chicago v. Phoenix Ins. Co.* (1888), 126 Ill. 276.

⁶ *Employers Liability Ass. Co. v. Merrill* (1891), 155 Mass. 409; s.c. 29 N. E. Rep. 529.

⁷ *State v. Benton* (1889), 25 Neb. 834; s.c. 41 N. W. Rep. 793.—*Barbor v. Boehm* (1887), 21 Neb. 450.

⁸ *Ins. Co. v. House* (1890), 89 Tenn. 438.—*State v. Phoenix Ins. Co.* (1893), 92 Tenn. 420; s.c. 21 S. W. Rep. 893.—*State v. Thomas* (1890), 88 Tenn. 491.—*Romaine v. Union Ins. Co.* (1893), 55 Fed. Rep. 751.

⁹ *State ex rel. Covenant Mut. Ben. Ass. of Ill. v. Root* (1893), 83 Wis. 667.—*State v. Citizens Ins. Co. of Mobile* (1888), 71 Wis. 411.

¹⁰ *Cooke v. Warner* (1888), 56 Conn. 234; s.c. 14 Atl. Rep. 798.—*Am. Cas. Ins. & Secy. Co. v. Tyler* (1891), 60 Conn. 448.

¹¹ *Phoenix Ins. Co. v. Welch*, 29 Can. 672.—*Southwestern Mut. Ben. Assoc. v. Swenson* (1892), 49 Kan. 449.

¹² *State v. Fidelity & Cas. Ins. Co.* (1888), 39 Minn. 538; s.c. 41 N. W. Rep. 108.

¹³ *Boulware v. Davis* (1890), 90 Ala. 207.—*Ala. Gold Life Ins. Co. v. Lott* (1875), 54 Ala. 499.

¹⁴ *State v. Ins. Co. of N.A.* (1888), 115 Ind. 257.—*Rehm v. German Ins. & Sav. Inst. of Quincy* (1890), 125 Ind. 135.

¹⁵ *Trav. Ins. Co. v. Sheppard* (1890), 85 Ga. 751.

¹⁶ *Oland v. Agric. Ins. Co.* (1888), 69 Md. 248; s.c. 14 Atl. Rep. 609.—*Metro. Life Ins. Co. v. Dempsey* (1890), 72 Md. 238; s.c. 19 Atl. Rep. 642.

¹⁷ *Aetna Life Ins. Co. v. Hanna* (1891), 81 Tex. 487; s.c. 17 S. W. Rep. 35.

¹⁸ *Hazeltine v. Miss. Valley F. Ins. Co.* (1893), 55 Fed. Rep. 743.

¹⁹ *State v. New Engl. Mut. Ins. Co.* (1891), 43 La. An. 133; s.c. 8 So. Rep. 888.—*State v. Lpl. & Ldn. & Globe Ins. Co.* (1888), 40 La. An. 463; s.c. 4 So. Rep. 504.

In *Seyk v. Millers Nat. Ins. Co.* (1890), 74 Wis. 67, 72, a contract with a foreign insurance company was held to be controlled by the Wisconsin statute.

See also *Equitable Life Ass. Soc. v. Clements* (1890), 140 U.S. 226, where policy was held governed by the laws of the state of its inception and completion.

In *Curnow v. Phoenix Ins. Co. of Hartford* (1892) 16 S. E. Rep. 132, the Supreme Court of South Carolina ruled that the delivery of a foreign company's policy by the agent constituted the contract, and the cause of action arose where the loss occurred.

It was decided in *Hacheny v. Leary* (1885), 12 Or. 40, that taking an application for life insurance by an agent of a company, which had not complied with the laws of the territory, and forwarding it to the company at its domicile, where the policy was issued, was not "doing business" in the territory within the meaning of the statute; but subsequently taking a note for an instalment of the premium and transmitting it to the company, was held to come under that term.

In *Wrestling v. Warthing* (1890), 1 Ind. App. 217, the court was of opinion that a foreign company, which had not complied with the statutes, could not maintain an action for annual dues ; and the fact that such company had been dissolved, and the suit was brought by a receiver of it, and the company could not then, for that reason, comply with the statute, did not permit the receiver to maintain the action.

The trust character of securities deposited with some state official for the protection of policy holders was discussed in *Cooke v. Warner* (1888), 56 Conn. 234, s. c. 14 Atl. Rep. 798. It was said there that such trusts have been held as perfect as those created by deed or will, and as much entitled to protection from courts ; and where the affairs of a company were placed in the hands of receivers, the latter could not by action recover the amount deposited with the state treasurer. The court said :—" It was a trust fund in his hands for the benefit of the various policy holders. The state had made him a trustee, placed no limitation upon his rights and powers as such, and presumably intended to leave him subject to the general law of trusts. When the trust terminates, it is his duty to distribute the fund among the beneficiaries. But, as the statute provided that the company should receive the interest and dividends upon the securities, the receivers were held to be entitled to the income and dividends that had accrued or might accrue afterwards while in the hands of the trustee."

See also *Beach*, 59, on the question of the status of foreign insurance companies in the United States.

CHAPTER XXIV.

WINDING-UP OF COMPANIES.

418. GENERAL REMARKS, LEGISLATIVE ENACTMENTS AND JURISPRUDENCE ON WINDING-UP OF COMPANIES.

419. AUTHORITY OF MASTER — INSUFFICIENT SECURITY.

420. DECLARATION OF DIVIDEND OUT OF PAID-UP CAPITAL OF INSOLVENT COMPANY.

421. CALLS ON STOCK AFTER SUSPENSION OF LICENSE.

418. General remarks, legislative enactments and jurisprudence on winding-up of companies.—The provisions of the Dominion Winding-up Act¹ apply to all foreign companies doing business in Canada as well as to Canadian companies, and where a foreign company is in liquidation abroad, it may still be wound up here under the Dominion Act, the effect of the winding-up here being to entitle the liquidator here to realize the assets and, after paying the creditors (not merely creditors within this jurisdiction, but all creditors), to remit the balance, if any, of the assets to the foreign liquidator to be applied and distributed as may there be directed by the proper forum. In other words, the winding-up in Canada is subsidiary and ancillary to that instituted in the forum of the domicile of the corporation.²

Under the Winding-up Act before its amendment,³ the Supreme Court of Canada doubted the constitutionality of Canadian legislation dealing with the winding-up of foreign companies,⁴ but since the amendment and as the Act stands to-day, there can be no doubt concerning its constitutionality and its application to foreign companies.⁵

¹ R. S. C., c. 129.

² *Allen v. Hanson (in re the Scottish Can. Asbestos Co.)*, 18 S. C. R. 667.—*In re Queensland Mercantile Agency Co.*, 58 Law Times 878.—*In re Commercial Bank of Australia*, 33 L. R. (Chy. D.) 174.—*In re Matheson Bros. (Ltd.)*, 27 L. R. (Chy. D.) 235.—*In re Com. Bank of India*, 6 L. R., Equity Cases, 517.—*In re Glasgow & London Ins. Co., Supr. Ct., Montreal*, 1892 (not reported), and see *supra* § 414.

³ 47 Vic., c. 39, s. 1.

⁴ *Merchants Bank of Halifax & Gillespie*, 10 S. C. R. 312.

⁵ See note 2 *supra*.

The Dominion Winding-up Act¹ provides for the compulsory liquidation of companies on the application of creditors. The Winding-up Amendment Act, 1889,² provides for the voluntary winding-up at the instance of shareholders.³

The expression "insurance company" in the Winding-up Act means a company carrying on, either as a mutual or a stock company, the business of insurance, whether life, fire, marine, ocean or inland marine, accident, guarantee or otherwise.⁴

The Dominion Winding-up Act, however, does not supersede the Ontario provincial legislation regarding the appointment of a receiver. There is no general rule that a receiver already appointed must be displaced by the liquidator under the Winding-up Act.⁵ But the receiver is usually named liquidator, and conversely, where a receiver is applied for after the liquidator has been appointed, the liquidator is usually named receiver.⁶

In provincial mutual fire insurance companies a receiver was usually named for winding-up;⁷ but in the revision of 1887⁸ an essential provision was omitted.⁹ This appears to have been a mere oversight, for the companion Insurance Act, R. S. O., 1881, c. 160, continued¹⁰ the large powers conferred on receivers of insurance companies by 39 Vic., c. 23, sec. 21 (O.). In R. S. O., 1877, c. 167, s. 153, "receiver" is used synonymously with "liquidator," and 53 Vic., c. 39, s. 10 (O.), expressly provides that the High Court, upon the petition of the Attorney-General or of anyone interested, may, by judgment or order, limit the time within which the corporation shall settle and close its accounts; and may for this specific purpose, or for the purpose of liquidation generally, appoint a receiver.

In *Union Fire Ins. Co. v. Fitzsimmons et al.*,¹¹ the insurance company's license had been withdrawn; B. had been appointed receiver and had, by order of the Chancery Division, sued all

¹ R. S. C., c. 129. ² 52 Vic., c. 32.

³ *Re Ont. Bolt & Forge Co.*, 25 O. R. 407 (1894).

⁴ R. S. C., c. 129, sec. 2 (b).

⁵ R. S. O. 1887, c. 44, secs. 23, 35, 53 (8).—*Re Pound, etc.*, L. R. 42 Chy. D. 402.—*Re Lloyd, etc.*, 6 Chy. D. 339.—*Bartlett v. North Ave. Co.*, 53 L. T. N. S. 611, 612.

⁶ *Perry v. Oriental Hotels Co.*, L. R. 5 Chy. App. 420.—*Re Oriental Hotels Co.*, L. R. 12 Eq. 126.—*Boyle v. Bettws Colliery Co.*, 2 Ch. D. 726.—*Re Pound, etc.*, 42 Chy. D., 412.—*Hunter's Ins. Corpns. Act*, 1892, p. 57.

⁷ 36 Vic., c. 44, ss. 74, 75, 76. ⁸ R. S. O., 1877, c. 161, s. 78.

⁹ *Hill v. Merchants' & Manufacturers' Ins. Co.*, 28 Gr. 561. ¹⁰ Sec. 22.

¹¹ 32 U. C. C. P. 615, *infra* § 421.

members in arrears for calls; on appeal, it was held, affirming the court below, that the suit and proceedings therein were valid.

As applied to the liquidation of Ontario provincial insurance companies, the Dominion Winding-up Act is said to have proved tedious and wasteful.¹ In the case of the Union Fire Insurance Company, the provincial license was withdrawn in 1881 and winding-up proceedings began. In 1885, in the Ontario Court of Appeal, while expressing his opinion that upon one ground, which he designated as a purely technical and unmeritorious objection, the order in appeal ought to be reversed, Osler, J. A., said:—"The only practical result of the objection seems to be that the winding-up of this insolvent company has been delayed for more than a year. The delay and expense which have been already incurred are a reproach to the administration of justice, the litigation having been pending for nearly five years, with the result, as we understand, that between \$5000 and \$6000 of the company's assets have been expended in costs."² The litigation worked its way onward to the Supreme Court of Canada, which vacated the order that was in appeal. This was in 1886. A new order was had. Litigation broke out anew and, passing from court to court, the Union Fire Insurance Company had by the year 1890 once more worked its way up to the Supreme Court of Canada. In his judgment, Mr. Justice Patterson, citing the words of Osler, J. A., in 1885, said:—"The reproach to the administration of justice is now more glaring, for four years more have elapsed and, save as advanced by the recent hearing of this appeal, the litigation is precisely at the same stage, the former order having been replaced by that of the Chancellor, but with an inevitably large addition to the costs."³

Prior to the Insurance Corporations Act, it was found necessary in Ontario, in the case of provincial insurance companies, to resort to the Dominion Winding-up Act, because the necessary powers were not elsewhere provided.

419. Authority of Master—Insufficient security.—A Master of the High Court has no authority under the provisions of the Insurance Corporations Act, 1892, to direct security to be given by an officer of a company being wound up, in place of an insufficient security already given by such officer. Section 54, ss. 5 and

¹ See Introduction to Hunter's Ins. Corpsns. Act, 1892, p. lviii.

² 13 A. R. 295. ³ 17 S. C. R. 272.

6, merely provide for the giving of security as interim receiver, which may be made a condition of retention in that office, but default in giving which cannot be punished by imprisonment for contempt.¹

420. Declaration of dividend out of paid up capital of insolvent company.—Should the managers, directors or trustees of any fire, life, marine or other insurance company, incorporated by the Parliament of Canada, or of the Province of Quebec, knowingly declare any dividend or bonus out of the paid up capital of an insolvent company, they are jointly and severally liable for all the debts of the company then due, or thereafter contracted, while they remain in office.²

421. Calls on stock after suspension of license.—In actions for calls on stock, an objection was taken that there was no power to sue, because the company's license under 42 Vict., c. 25 (Ont.), had been revoked; but as it was shown that one B. had been appointed receiver and was specially required by order of the Chancery Division to prosecute all members in arrear for calls; and that he had adopted these actions and was prosecuting them as receiver, it was decided that the objection was not tenable.³

And where by an order of the Lieutenant-Governor of Ontario in Council, issued under 42 Vict., c. 25, the plaintiffs' license had been and still was suspended, whereby it became unlawful for the plaintiffs to do any further business in Ontario; and the calls sued for were made for the purpose of enabling the plaintiffs to carry on their business in Ontario, it was ruled, that the defence should have alleged notice in the Gazette of the suspension of the license, pursuant to R. S. O. (1877) c. 160, s. 34, and 42 Vict., c. 25, s. 3, sub-sec. 7; but an amendment was allowed, this point not having been taken, and it was held, also, a good defence for that bringing an action for calls was transacting business of insurance within the meaning of the above Acts.⁴

¹ Re Dom. Prov. Benevolent & Endowment Ass., 24 O.R. 416. ² R.S.Q. 5376.

³ Union Fire Ins. Co. v. Fitzsimmons; Same plaintiffs v. Shields, 32 C.P. 602.

⁴ Union Fire Ins. Co. v. Lyman, 46 Q.B. 471.

See Fogg v. Supreme Lodge Order of Golden Lion (Mass. 1893), 33 N. E. Rep. 692, for a recent American decision regarding the winding-up of a mutual benefit insurance corporation organized under the statutes of Massachusetts and the rights of certificate holders in the distribution of assets.—And see New Era Life Ass'n v. Weigle (1899), 128 Pa. Ct. 577, where the defence in an action brought by the receiver for assessments was, that the agent had made misrepresentations as to the association having a paid-up capital stock which would prove a guaranty against any payment of assessments, and the Pennsylvania Supreme Court decided, that this was such a material misrepresentation as to justify a rescission of the contract.

APPENDIX.

CANADIAN INSURANCE LEGISLATION.

DOMINION ENACTMENTS.

THE INSURANCE ACT, CHAP. 124, REVISED STATUTES OF CANADA (1886), AS AMENDED BY 51 VIC., CHAP. 28 (1888), AND 57 VIC., CHAP. 20 (1894), AND 58-59 VIC., CHAP. 20 (1895).

The principal amendments are shown in italics.¹

(The Act of 1888, assented to 22nd May of that year, amended subsection (c) of section 3; all the other amendments were made by the Act of 1894, assented to July 23rd of the year last mentioned, with exception of sec. 20, amended by 58-59 Vic., chap. 20 (1895).

HER Majesty, by and with advice and consent of the Senate and House of Commons of Canada, enacts as follows:--

SHORT TITLE.

1. This Act may be cited as "*The Insurance Act.*"

INTERPRETATION.

2. In this Act, unless the context otherwise requires:--

(a.) The expression "Minister" means the Minister of Finance and Receiver General;

(b.) The expression "Superintendent" means the Superintendent of Insurance;

(c.) The expression "company" means and includes any corporation or any society or association, incorporated or unincorporated, or any partnership carrying on the business of insurance;

(d.) The expression "Canadian company" means a company incorporated or legally formed in Canada, for the purpose of carrying on the business of insurance in Canada, and which has its head office therein;

(e.) The expression "agent" means the chief agent of the company in Canada, named as such in the power of attorney hereinafter referred to, by whatever name he is designated;

(f.) The expression "chief agency" means the principal office or place of business of the company in Canada;

(g.) The expression "inland marine insurance" means marine insurance in respect to subjects of insurance at risk upon the waters of Canada above the harbour of Montreal;

(h.) The expression "Canadian policy" or "policy in Canada," as regards life insurance, means a policy issued by any company licensed under this Act to transact the business of life insurance in Canada, in favour of any person or persons resident in Canada at the time when such policy was issued; and "policy-holder in Canada" means any such person as aforesaid;

(i.) The expression "Canadian policy" or "policy in Canada," as regards fire and inland marine insurance, means a policy of insurance on any property within

¹ The majority of foot-notes in/va referring to Dominion enactments have been taken from reports published by the Superintendent of Insurance.

Canada, issued by any company licensed under this Act to transact the business of fire or inland marine insurance ;

(j.) The expression "license" includes certificate of registration ;

(k.) The expression "policy" includes a certificate of membership relating in any way to life insurance, *and any other written contract of insurance whether contained in one or more documents.* (Under the Interpretation Act the word "written" includes words "printed, painted, engraved, lithographed, or otherwise traced or copied").

APPLICATION OF ACT.

3. The provisions of this Act shall not apply—

(a.) To any company transacting, in Canada, ocean marine insurance exclusively ; or—

(b.) To any policy of life insurance in Canada, issued previously to the twenty-second day of May, in the year one thousand eight hundred and sixty-eight, by any company which has not subsequently received a license ; or—

(c.) To any company incorporated by an Act of the Legislature of the late province of Canada, or by an Act of the Legislature of any province now forming part of Canada, which carries on the business of insurance, wholly within the limits of that province by the Legislature of which it was incorporated, and which is within the exclusive control of the Legislature of such province ; but any such company may, by leave of the Governor in Council, on complying with the provisions of this Act, avail itself of the provisions of this Act, and if it so avails itself, the provisions of this Act shall thereafter apply to it, and such company shall have the power of transacting its business of insurance throughout Canada.¹

LICENSES.

4. No company or person, except as hereinafter provided, shall accept any risk or issue any policy of fire or inland marine insurance or policy of life insurance, or grant any annuity on a life or lives, or receive any premium, or carry on any business of life or fire or inland marine insurance, in Canada,—or prosecute or maintain any suit, action or proceeding, either at law or in equity, or file any claim in insolvency relating to such business, without first obtaining a license from the Minister to carry on such business in Canada.

2. Before issuing a license to a company legally formed elsewhere than in Canada, the Minister must be satisfied that the corporate name of the company is not that of any other known company incorporated or unincorporated, or any name liable to be confounded therewith, or otherwise on public grounds objectionable.²

3. The license shall be in such form as is, from time to time, determined by the Minister, and shall specify the business to be carried on by the company ; and it shall expire on the thirty-first day of March in each year, but shall be renewable from year to year.

6. The Minister, as soon as the company applying for the same has deposited in his hands the securities hereinafter mentioned, and has otherwise conformed to the requirements of this Act, shall issue such license as aforesaid.

6A. *A license shall not be granted to a company to carry on the business of life insurance in combination with any other branch of insurance.*³

¹ Under the original subsections contained in the Revised Statutes, a Dominion license could be granted to a company incorporated under the authority of one of the provinces of the Dominion for the transaction of the business of life insurance, but such a license could not be granted to a provincial company formed for the transaction of any other kind of insurance. Under the amended subsection, all insurance companies incorporated by or under the authority of the Legislatures of the various provinces of the Dominion, are placed upon the same footing, and are entitled to Dominion license upon complying with the terms and conditions of the Insurance Act. ² *Infra* p. 719.

³ Section 6A is new so far as the statute is concerned, but, as regards the practice of the department of insurance for many years, involves no new principle.

The basis of subsection one is an Order in Council passed in 1882 which has been rigidly adhered to since that time.

2. A license may be granted to a company to carry on the three following classes of insurance, viz. : fire insurance, inland marine insurance and cyclone or tornado insurance or any two of the said classes.

3. A license may be granted to a company to carry on any two of the following classes of insurance :—

(a.) Guarantee insurance, that is to say : to guarantee the fidelity of persons in positions of trust ;

(b.) Accident insurance, that is to say : to insure against bodily injury and death by accident, including the liability of employers for injuries to persons in their employment ;

(c.) Plate-glass insurance, that is to say : to insure against the breakage of plate or other glass either local or in transit ;

(d.) Steam boiler insurance, that is to say : to insure against loss or damage to the life, person or property of the insured or of another for which the insured is liable, caused by the explosion of steam boilers.

4. A license may, on the recommendation of the Superintendent of Insurance approved by the Treasury Board, be granted to a company to carry on any class or classes of insurance not hereinbefore enumerated, but no such license shall be granted for more than two such classes of insurance, or on the like recommendation approved as aforesaid, a license may be granted to a company to carry on one of the classes of business above enumerated, and one other class of insurance not above enumerated.

5. Except as hereinbefore provided, a license shall not be granted to a company to carry on more than two classes of business.

(The amending Act provides that this section shall not interfere with the renewal of licenses granted before the passing of the Act, 23rd July, 1894, or with any application for license pending on the 1st day of April, 1894).

6B. A license shall not be granted to a company which is by its charter authorized or empowered to carry on classes or branches of insurance greater in number or variety than those for which a license could be granted under the provisions of the next preceding section. Provided, however, that any company incorporated elsewhere than in Canada, regardless of its charter powers, which has a paid-up capital, in the case of a company authorized to transact among other classes of business the business of fire insurance, of at least three hundred thousand dollars, and in the case of any other company, of at least one hundred thousand dollars, wholly unimpaired and in addition to such paid-up capital holds over and above all liabilities estimated according to the existing Dominion Government standard, a rest or surplus fund equal to at least twenty per cent. of such paid-up capital, and the market value of whose stock is at a premium of at least twenty per cent., and which has carried on successfully for a period of at least five years, the business for which a license is sought, being only one class of insurance, or if more than one then such classes as may be combined under the provisions of the next preceding section, shall be deemed eligible for and entitled to such license upon depositing, keeping and maintaining assets in Canada as defined by subsections two and three of section ten of this Act, over and above and in excess of the amount which would be required, if such company's charter powers were limited to the purposes for which such license is asked, to such an amount as the Treasury Board, on the report of the Superintendent, shall fix or determine, not being less than ten thousand dollars nor more than two hundred thousand dollars, such excess to be regarded as the company's Canadian capital.

(The amending Act provides that this section shall not interfere with the renewal of licenses granted before the passing of the Act, 23rd July, 1894).¹

¹ Section 6B is now introduced into the statute for the first time, but recently the practice of the department of insurance, sanctioned by Order in Council, has been substantially in accordance with its provisions.

DEPOSITS TO BE MADE BEFORE THE ISSUE OF LICENSE.

7. Every company carrying on the business of life insurance, and every Canadian company carrying on the business of fire or of inland marine insurance, or of both combined, shall, before the issue of such license, deposit with the Minister, in such securities as are hereinafter mentioned, the sum of fifty thousand dollars; and every company incorporated or legally formed out of Canada, carrying on the business of fire or of inland marine insurance, or of both combined, shall, before the issue of such license, deposit with the Minister, in such securities as are hereinafter mentioned, the sum of one hundred thousand dollars.

8. All such deposits may be made by any company in securities of the Dominion of Canada, or in securities issued by any of the provinces of Canada; and by any company incorporated in the United Kingdom, in securities of the United Kingdom; and by any company incorporated in the United States, in securities of the United States; and the value of such securities shall be estimated at their market value, *not exceeding par*, at the time when they are so deposited:¹

2. If any securities other than those above mentioned are offered as a deposit, they may be accepted, at such valuation and on such conditions as the Treasury Board directs:

3. If the market value of any of the securities which have been deposited by any company declines below that at which they were deposited, the Minister may notify the company to make a further deposit, so that the market value of all the securities deposited by the company shall be equal to the amount which it is required by this Act to deposit; and on failure by the company to make such further deposit within sixty days after being called upon so to do, the Minister may withdraw its license:

4. Any company licensed under this Act may at any time deposit in the hands of the Minister any further sums of money or securities beyond the sum herein required to be deposited; and any such further sums of money, or securities therefor, so deposited in the hands of the Minister, shall be held by him and be dealt with according to the provisions of this Act in respect to the sum required to be deposited by such company, and as if the same had been part of the sum so required to be deposited:²

5. *If at any time it appears that a company has on deposit with the Minister a sum in excess of the amount required under the provisions of this Act, the Treasury Board may, upon being satisfied that the interest of the company's Canadian policyholders will not be prejudiced thereby, and upon the giving of such notice, and the exercise of such other precautions as may seem expedient, authorize the withdrawal of the amount of such excess or such portion thereof as may be deemed advisable; provided that such withdrawal may be authorized without the giving of any notice.*³

9. If it appears from the annual statements, or from an examination of the affairs and condition of any company carrying on the business of fire or inland marine insurance, that the reinsurance value of all its risks outstanding in Canada, together with other liabilities in Canada, exceeds its assets in Canada, including the deposit in the hands of the Minister, the company shall be notified by the Minister

¹ The amendment to the first subsection of section eight, only confirms what has been the practice of the department of insurance for many years. There are on record several instances in which securities have been offered at rates *exceeding par*, but in no recent case have they been accepted at a higher rate than *par*.

² Subsection four of section eight in its original form was obscure and its meaning doubtful. As amended, it confirms what has been decided by the law officers of the Crown to have been the true meaning of the original subsection.

³ Subsection five of section eight is new. The original Act made no provision for a release of a portion of the deposit of a company which was desirous of continuing its business, however much in excess of the requirements of the statute such deposit might be, and it was considered that cases might arise in which it would be not only proper to permit a partial release, but would be a source of real hardship to be obliged to refuse it.

to make good the deficiency ; and on its failure so to do, within sixty days after being so notified, he shall withdraw its license.

10. If it appears from the annual statements, or from an examination, as provided for by this Act, of the affairs and conditions of any company carrying on the business of life insurance, that its liabilities to policy-holders in Canada, including matured claims, and the full reserve or reinsurance value for outstanding policies, as hereinafter described, after deducting any claim the company has against such policies, exceed its assets in Canada, including the deposit in the hands of the Minister, the company shall be called upon by the Minister to make good the deficiency ; and on its failure so to do within sixty days, he shall withdraw its license :

2. If any such company as is mentioned in this and the next preceding section is incorporated or legally formed elsewhere than within Canada, the assets in Canada as aforesaid shall be taken to consist of all deposits which the company has made with the Minister under the foregoing provisions of this Act, and of such assets as have been vested in trust for the company for the purposes of this Act, in two or more persons resident in Canada, appointed by the company and approved by the Minister :

3. The trust deed shall first be approved of by the Minister, and the trustees may deal with such assets in any manner provided by the deed of trust appointing them, but so that the value of the assets held by them shall not fall below the value required by this section :

4. In the case of any such life insurance company, which gave written notice to the Minister before the thirty-first day of March, in the year one thousand eight hundred and seventy-eight, of its intention to avail itself of the proviso contained in section seven of "*The Consolidated Insurance Act, 1877*," the foregoing requirements of this section shall not apply to policies issued previously to that date ; and the deposit of such company, which was in the hands of the Minister, on the twenty-eighth day of April, in the year one thousand eight hundred and seventy-seven, shall be dealt with in regard to such policies, in conformity with the fourth and fifth sections of an Act passed by the Parliament of Canada in the thirty-fourth year of Her Majesty's reign, intituled "*An Act to amend the Act respecting Insurance Companies*," and whenever the full liability under such policies falls below the amount so held by the Minister, he may, with the concurrence of the Treasury Board, direct that the whole or such portion of the difference as he deems advisable, shall be released and handed over to the company, and so on, from time to time, until the total deposit with the Minister is reduced to the amount of fifty thousand dollars required by this Act.

(The sections of 34 Victoria, chap. 9, referred to in this subsection will be found *infra* at page 717).

11. So long as the conditions of this Act are satisfied by any company, and no notice of any final judgment against the company, or order made by the proper court in that behalf for the winding-up of the company or the distribution of its assets, is served upon the Minister, the interest upon the securities forming the deposit shall be handed over to the company as it falls due.¹

DOCUMENTS TO BE FILED.

12. Every company shall, before the issue of a license to it, file in the Department of Finance,—

(a) A copy of the charter, Act of incorporation, or articles of association of the company, certified by the proper officer in charge of the original thereof ;

¹ Taking into consideration the provisions of the Act regarding deposits, the meaning of section eleven in its original form was not clear ; as amended, it differs from the original section by the omission of the words " any company's deposit is unimpaired," and makes clear what has been understood to be its meaning and intention.

(b) A power of attorney from the company to its agent in Canada, under the seal of the company, if it has a seal, and signed by the president and secretary or other proper officers thereof, in presence of a witness, who shall make oath or affirmation as to the due execution thereof; and the official positions in the company held by the officers signing such power of attorney shall be sworn to or affirmed by some person cognizant of the facts necessary in that behalf; and—

(c) A statement in such form as is required by the Minister, of the condition and affairs of such company on the thirty-first day of December then next preceding, or up to the usual balancing day of the company, if such day is not more than twelve months before the filing of the statement.

13. Such power of attorney shall declare at what place in Canada the head office, or chief agency of such company is, or is to be established,—and shall expressly authorize such attorney to receive service of process in all suits and proceedings against such company in any province of Canada, in respect of any liabilities incurred by the company therein, and also to receive from the Minister and the Superintendent, all notices which the law requires to be given, or which it is thought advisable to give,—and shall declare that service of process for or in respect of such liabilities, and receipt of such notices, at such office or chief agency, or personally on or by such attorney at the place where such head office or chief agency is established, shall be legal and binding on the company to all intents and purposes whatsoever.

14. Whenever any such company changes its chief agent or chief agency in Canada, such company shall file a power of attorney, as hereinbefore mentioned, containing any such change or changes in such respect, and containing a similar declaration as to service of process and notices as hereinbefore mentioned; and every company shall at the time of making the annual statement hereinafter provided for, declare that no change or amendment has been made in the charter, Act of incorporation or articles of association of the company, and that no change has been made in the chief agency or chief agent, without such amendment or change having been duly notified to the Superintendent.

15. Duplicates of all such documents, duly verified as aforesaid, shall be filed in the office of one of the superior courts in the province in which the head office or chief agency of the company is situated,—or if the chief agency is in the province of Quebec, with the prothonotary of the Superior Court of the district wherein such chief agency is established.

SERVICE OF COMPANIES WITH PROCESS.

16. After such power of attorney and certified copies are filed as aforesaid, any process in any suit or proceeding against any such company, in respect of any liabilities incurred in any province of Canada, may be validly served on the company at its chief agency; and such service shall be deemed to be service on the company:

2. If such power of attorney becomes invalid or ineffective from any reason whatsoever, or if other service cannot be effected, the court or a judge may order constructive service of any process or proceeding to be made by such publication as is deemed requisite to be made in the premises for at least one month in at least one newspaper; and such publication shall be held to be due service upon the company of such process or proceeding.

NOTICE OF LICENSE.

17. Every company on first obtaining such license shall forthwith give due notice thereof in the *Canada Gazette*, and at least one newspaper in the country, city or place where the head office or chief agency is established, and shall continue the publication thereof for the space of four weeks:

2. The like notice shall be given, for the space of three calendar months, when a company ceases, or gives notice that it intends to cease, to carry on business in

Canada, such notice to be a condition precedent to the release of the company's deposit.¹

PUBLICATION OF LICENSED COMPANIES.

18. The Minister shall cause to be published quarterly in the *Canada Gazette* a list of the companies licensed under this Act, with the amount of deposits made by each company; and upon any new company being licensed, or upon the license of any company being withdrawn in the interval between two such quarterly statements, he shall publish a notice thereof in the *Canada Gazette* for the space of four weeks.

ANNUAL RETURNS BY COMPANIES.

19. The president, vice-president or managing director, and the secretary, *actuary* or manager of every Canadian company licensed under this Act, shall prepare annually, under their own oath, a statement of the condition and affairs of such company at the thirty-first day of December in each year, which statement shall exhibit the assets and liabilities of the company, and its income and expenditure during the previous year, and such other information as is deemed necessary by the Minister.

2. In the case of such companies carrying on the business of life insurance, such statement shall be made in the form and manner set forth in the Form A in the schedule to this Act; *suitable changes being made therein in the case of companies carrying on business on the assessment plan.*

3. In the case of such companies carrying on the business of fire or inland marine insurance, such statement shall be made in the form and manner set forth in the Form B in the schedule to this Act.

4. *In the case of such companies carrying on business other than life, fire or inland marine insurance, such statement shall be made in the form and manner set forth in the said Form B, as nearly as circumstances will permit, necessary changes only being made therein.*

5. Such statements shall be sworn to before some person duly authorized to administer oaths in any legal proceeding, in the Form C in the schedule to this Act.

6. The Minister may, from time to time, make such changes in the form of such statements as seem best adapted to elicit from the companies a true exhibit of their condition in respect to the several points hereinbefore enumerated.²

¹ The amendment to the second clause of section seventeen removes a doubt which existed as to whether it was necessary for a company applying for the release of its deposit to have published in a newspaper the notice which the clause prescribes. Such publication, whether absolutely necessary or not, was customary and is now made compulsory.

² Sections nineteen, twenty and twenty-one have been redrafted and several important amendments made therein, particularly in sections twenty and twenty-one. In sections nineteen and twenty the *actuary* of a company is named as one of the officers who may with another proper officer verify its statement, in the case of Canadian companies, and in the case of companies other than Canadian, may with another named officer verify the statement of the company's general business. The statement of the Canadian business of a company incorporated elsewhere than in Canada must in every case hereafter be verified by the oath of the company's chief agent in Canada. The time for filing the annual statements is unchanged, but the penalty in case of default has been changed (sec. 21) from \$500 and an additional penalty of \$100 a month, to \$10 for each day during which the default continues, all such penalties to be recoverable at the suit of Her Majesty instituted by the Attorney General, with the further provision that until such penalties are paid the company's license shall not on expiry be renewed.

It has been understood in the department of insurance that the Act in its original form by implication required the chief agent in Canada of a company other than a Canadian company to keep at his office in Canada a full and complete record of the Canada business of the company, but the Act did not, in express terms, so provide, and as a consequence the necessity of keeping such records was not fully understood and recognised. Now, however, subsections three, four and five of section twenty point out specifically what is necessary and what shall be deemed sufficient. Subsection six

20. Every company incorporated or legally formed elsewhere than in Canada, and at present licensed or hereafter licensed under this Act, and every company which is subject to the provisions of this Act, shall make annual statements of its condition and affairs, at the balancing day of the company in each year, and the form and manner of making such statements shall, as to the Canada business of such company, be the same, so far as applicable, as is required of Canadian companies, and as to its general business, shall be in such form as such company is required by law to furnish to the government of the country in which its head office is situate; and where such company is not required by law to furnish a statement to the government of the country in which its head office is situate, then such statement, as to its general business, shall be in such form as the company usually submits to its members or shareholders, and, in the event of no such statement being submitted to such members or shareholders, shall show in concise form the assets and liabilities of the company at such balancing day and the income and expenditure of the company for the year ending on such balancing day. The blank forms of the statements of the Canada business shall be supplied by the Superintendent.¹

2. Such statements shall, as to the Canada business, be verified by the oath of the company's chief agent, in Canada, and as to the general business, shall be verified by the oath of the president, vice-president or managing director and secretary or actuary of the company.

3. Such chief agent shall keep at his chief agency in Canada records and documents sufficient to enable him to prepare and furnish the statement of Canada business in this section provided for, and such that the said statement of Canada business may be readily verified therefrom: Provided that in the case of any company having in Canada in addition to such chief agent one or more general agents reporting to the head office, and not to such chief agent, the requirements of this subsection shall be sufficiently complied with by such chief agent keeping on file at the chief agency, in addition to the necessary records and documents relating to the business transacted by or through such chief agent, annual statements of the business transacted by each such general agent, duly verified by the oath of each such general agent, and such additional records and documents transmitted through the company's head office as shall, taken together, show the company's entire Canadian business.

4. The statements of the business of general agents in the next preceding subsection provided for, shall be made up to the thirty-first day of December in each year, and the blank forms for such statements shall, on application, be furnished by the Superintendent.

5. In the case of any company not availing itself of the proviso contained in subsection three of this section, such subsection shall be read and construed without reference to such proviso, and as if the said proviso and the subsection next preceding this subsection did not exist.

6. In every case where a company incorporated or legally formed elsewhere than in Canada, has heretofore made and filed with the Minister statements verified under oath, it is hereby declared that such statements and verification were and shall be deemed to have been, and to be sufficient within the intent and meaning of this section.

7. The statements mentioned in the next preceding section and the statements of Canada business provided for in the first subsection of this section shall be deposited in the office of the Superintendent on the first day of January next following

of section twenty is declaratory and was introduced for the purpose of covering irregularities, or supposed irregularities, in the verification of annual statements filed prior to its enactment.

Subsection eight of section twenty extends to all life companies doing business in Canada the provision requiring a preliminary abstract of Canadian business, which provision under the original Act was applicable only to Canadian companies. The time for the delivery of such preliminary abstract has, moreover, been extended from the fifteenth day of January to the first day of February.

¹ *Infra* p. 718.

the date thereof, or within two months thereafter; and every statement of general business provided for in the said first subsection of this section shall be deposited in the office of the Superintendent within fifteen days after it is required by law to be made to the government of the country in which the head office of the company whose statement it is, is situate, or within fifteen days after the submission of the same at the annual meeting of the shareholders or members of the company, whichever date first occurs: Provided however, that no such statement of general business need be so deposited earlier than the first day of May, nor shall it be so deposited later than the thirtieth day of June next following the date thereof. The date of a statement in this subsection referred to is the date at which the condition and affairs of the company are shown.

8. *All companies, whether Canadian or otherwise, carrying on the business of life insurance shall, on or before the first day of February in each year, send to the Superintendent a preliminary abstract of the year's Canada business to the thirty-first day of December inclusive. Such abstract shall comprise the cash premium receipts of the year, the number and amount of the policies issued and taken up during the year, the number and amount of policies that are in force at the date of the abstract, the number and amount of the policies that have become claims during the year, and the number and amount of those that have been paid up to the date of the statement, distinguishing as to such as are unpaid between those resisted and unresisted. Such preliminary abstracts shall be verified in the same manner as the annual statements hereinbefore provided for are required to be verified.*¹

21. *Every company which makes default in depositing in the office of the Superintendent the annual statement hereinbefore provided for, shall incur a penalty of ten dollars for each day during which such default continues; all such penalties shall be recoverable and enforceable with costs at the suit of Her Majesty, instituted by the Attorney General of Canada, and shall when recovered be applied towards payment of the expenses of the office of the Superintendent.*

2. *If such penalties are not paid, the Minister, with the concurrence of the Treasury Board, may order the license of such company to be suspended or withdrawn as is deemed expedient, and until such penalties are paid, the license of such company shall not on expiry be renewed.*²

22. Every person who delivers any policy of insurance, or interim receipt, or who collects any premium (except only on policies of life insurance issued to persons not resident in Canada at the time of issue), or carries on any business of insurance on behalf of any life, fire or inland marine insurance company, without such license as aforesaid, shall, on summary conviction thereof, before any two justices of the peace or any magistrate having the powers of two justices of the peace, for a first offence, incur a penalty of not less than twenty dollars and costs and not more than fifty dollars and costs, and in default of payment the offender shall be liable to imprisonment with or without hard labour for a term of not less than one month nor more than three months; and for a second or any subsequent offence such offender shall be imprisoned with hard labour for a term not less than three months nor more than six months:

2. One half of any such penalty when recovered shall belong to Her Majesty and the other half thereof to the informer.³

¹ *Id.* ² *Id.*

³ In the very recent case of *Goth v. Nagle*, heard before two magistrates at Carleton Place, Ont., on 5th April, 1897, but not yet reported, the defendant pleaded guilty to having delivered, contrary to the provisions of this section, a policy of fire insurance on behalf of a company without a license under the Insurance Act of Canada, and was convicted and sentenced to pay a fine of \$20.00 and costs.

23. All informations or complaints for the prosecution of offences under the provisions of sections twenty-two, twenty-five and forty-two of this Act shall be laid or made in writing within one year after the commission of the offence.

24. Unless otherwise provided in the special Act incorporating any insurance company, passed by the Parliament of Canada after the twenty-eighth day of April, one thousand eight hundred and seventy-seven, or hereafter to be passed, such special Act and all Acts amending the same shall expire and cease to be in force at the expiration of two years from the passing thereof, unless within such two years the company thereby incorporated obtains a license from the Minister under the provisions of this Act.

SUPERINTENDENT AND HIS DUTIES.

25. The Governor in Council may appoint an officer, to be called the Superintendent of Insurance, who shall act under the instructions of the Minister, and shall examine and report to the Minister, from time to time, upon all matters connected with insurance, as carried on by the several companies licensed to do business in Canada, or required by this Act to make returns of their affairs ;

2. Such Superintendent may be appointed at a salary not exceeding four thousand dollars per annum ;

3. The Governor in Council may, from time to time, appoint such officers and clerks under the Superintendent, as are necessary for the purposes of this Act ;

4. The Superintendent shall keep a record of the several documents required to be filed by each company in the superior courts of Canada, under this Act ; and shall,—

(a.) Enter in a book, under the heading of each company, the securities deposited on its account with the Minister, naming in detail the several securities, their par value, and value at which they are received as deposit ;

(b.) In each case, before the issue of any new license, or the renewal of any license, make a report to the Minister that the requirements of the law have been complied with, and that from the statement of the affairs of the company it is in a condition to meet its liabilities ;

(c.) Keep a record of the licenses as they are issued ;

(d.) Visit the head office of each company in Canada, at least once in every year, and examine carefully the statements of the condition and affairs of each company, as required under this Act, and report thereon to the Minister as to all matters requiring his attention and decision ;

(e.) Prepare for the Minister, from the said statements, an annual report, showing the full particulars of each company's business, together with an analysis of each branch of insurance, with each company's name ; giving items, classified from the statements made by each company :

5. If the Superintendent, after a careful examination into the condition and affairs and business of any company licensed to transact business in Canada, from the annual or other statements furnished by such company to the Minister or for any other cause, deems it necessary and expedient to make a further examination into the affairs of such company and so reports to the Minister, the Minister may, in his discretion, instruct the Superintendent to visit the office of such company, to thoroughly inspect and examine into all its affairs, and make all such further inquiries as are necessary to ascertain its condition and ability to meet its engagements, and whether it has complied with all the provisions of this Act applicable to its transactions :

6. The officers or agents of such company shall cause their books to be opened for the inspection of the Superintendent, and shall otherwise facilitate such examination so far as it is in their power ; and for that purpose the Superintendent may examine under oath the officers or agents of such company relative to its business :

7. A report of all companies so visited by the Superintendent shall be entered in

a book kept for that purpose, with notes and memoranda showing the condition of each company after such investigation ; and a special report shall be communicated in writing to the Minister, stating the Superintendent's opinion as to its standing and financial position, and all other matters desirable to be made known to the Minister :

8. If it appears to the Superintendent that the assets of any company are insufficient to justify its continuance of business under the requirements of sections seven, eight, nine and ten, or that it is unsafe for the public to effect insurance with it, he shall make a special report on the affairs of such company to the Minister ; and if the Minister, after full consideration of the report, and after a reasonable time has been given to the company to be heard by him, and upon such further inquiry and investigation as he sees proper to make, reports to the Governor in Council that he agrees with the Superintendent in the opinion so expressed in his report, the Governor in Council may, if he also concurs in such opinion, suspend or cancel the license of such company ; and such company shall, during such suspension or cancellation, be held to be unlicensed, and unauthorized to do further business :

9. Every person who, after notification of the suspension or cancelling of such license in the *Canada Gazette*, delivers any policy of insurance, collects any premium or transacts any business of insurance, on behalf of such company, shall be liable to the penalties provided for in the twenty-second section of this Act :

10. Once in every five years, or oftener, at the discretion of the Minister, the Superintendent shall himself value, or procure to be valued under his supervision, the Canadian policies of life insurance of all companies licensed under this Act to transact the business of life insurance in Canada ; and such valuation shall be based on the mortality table of the Institute of Actuaries of Great Britain, and on a rate of interest at four and one half per centum per annum, except in the case of bonus additions or profits accrued or declared before the twenty-eighth day of April, one thousand eight hundred and seventy-seven, and then valued on the basis of a rate of interest other than that above mentioned, which, in any such valuation, shall continue to be valued on such other basis :

11. The Minister may, from time to time, instruct the Superintendent to visit the head office of any company licensed under this Act and incorporated or legally formed elsewhere than in Canada, and to examine into the general condition and affairs of such company ; and if such company declines to permit such examination, or refuses to give any information necessary for such purpose, in its possession or control, its license shall be withdrawn :

12. Every company now licensed, and every company hereafter licensed under this Act, and every company transacting life insurance business under the thirty-second section of this Act, shall annually contribute a sum in proportion to the gross premiums received by it in Canada during the previous year, towards defraying the expenses of the office of the Superintendent :—which sum shall be paid upon the demand of the Superintendent :

13. The sum to be contributed annually by companies carrying on the business of fire or inland marine insurance in respect exclusively of such business carried on by them shall not exceed in all eight thousand dollars :

14. The Superintendent, or any officer or clerk under him, shall not, directly or indirectly, be interested as a shareholder in any insurance company doing business in Canada, or licensed under this Act :

15. The Minister shall lay the Superintendent's annual report before Parliament within thirty days after the commencement of each session thereof.

25A. *For the purpose of carrying out the provisions of this Act, the Superintendent of Insurance is hereby authorized and empowered to address any inquiries to any insurance companies licensed under this Act, or to the president, manager, actuary or secretary thereof in relation to its assets, investments, liabilities, doings or conditions, or any other matter connected with its business or transactions, and*

it shall be the duty of any company so addressed to promptly reply in writing to any such inquiries.¹

PROVISIONS RELATING TO LIFE INSURANCE.

26. The provisions of sections twenty-seven to forty-three inclusive apply only to life insurance companies and to other insurance companies carrying on life and other insurance, only in so far as relates to the life insurance business of such companies.

CONDITIONS ON POLICIES.

27. No condition, stipulation or proviso modifying or impairing the effect of any policy or certificate of life insurance issued after the first day of January, one thousand eight hundred and eighty-six, by any company doing business within Canada under the authority of the Parliament of Canada shall be good or valid unless such condition, stipulation or proviso is set out in full on the face or back of the policy.

28. No policy or certificate shall contain or have endorsed upon it any condition providing that such policy or certificate shall be avoided by reason of any statement contained in the application therefor being untrue, unless such condition is limited to cases in which such statement is material to the contract.

28A. *Where in any contract of life insurance entered into with any company licensed to carry on business in Canada under the provisions of this Act, the age of the person whose life is insured is given erroneously in any statement or warranty made for the purposes of the contract, such contract shall not be avoided by reason only of the age being other than as stated or warranted, if it appears that such statement or warranty was made in good faith and without any intention to deceive; but the person entitled to recover on such contract shall not be entitled to recover more than an amount which bears the same ratio to the sum that such person would otherwise be entitled to recover as the premium proper to the stated age of such person bears to the premium proper to the actual age of such person, the stated age and the actual age being both taken as at the date of the contract; but in no case shall the amount receivable exceed the amount stated or indicated in the contract.²*

2. For the purposes of this subsection the word "premium" means the net annual premium calculated on the basis prescribed by this Act.

(The amending Act provides that this section shall apply to contracts of life insurance existing at the time of the passing of the Act, 23rd July, 1884, or thereafter entered into).

Forfeiture and Renewal of Licenses.

29. Whenever satisfactory proof has been furnished to the Minister of any undisputed claim upon a company, arising on any policy of life insurance in Canada, remaining unpaid for the space of sixty days after becoming due, or of a disputed claim remaining unpaid after final judgment in a regular course of law and tender of a legal valid discharge made to the agent of such company, the Minister may withdraw the license of such company.

¹ Section 25A is new. Its provisions are almost identical with those contained in a similar statute in force in the State of New York, and it is believed they will prove useful and will enable the Superintendent to ask, without liability of refusal, important particulars and information not hitherto in all cases available.

² The provisions of section 28A are almost identical with those of the Ontario statute upon the same subject. Cases are not unknown where companies have denied all liability under policies in the application for which the age has through inadvertence been inaccurately stated, though happily such cases are rare, a very large majority of companies dealing equitably with their policyholders under the conditions provided for in the section.

30. Such license may be renewed if within thirty days after such withdrawal such undisputed claims or final judgments upon or against the company are paid and satisfied.

31. When the license of a company carrying on the business of life insurance has been withdrawn by the Minister under any of the foregoing sections of this Act, such license may be renewed if, within thirty days after such withdrawal, such company complies with the requirements of this Act to the satisfaction of the Minister.

Companies Ceasing to do Business and Release of Deposits.

32. In the case of any company which, previously to the twenty-eighth day of April, in the year one thousand eight hundred and seventy-seven, was licensed to transact the business of life insurance in Canada, and which ceased to transact such business before the thirty-first day of March, one thousand eight hundred and seventy-eight, having before that date given written notice to that effect to the Minister, the premiums due or to become due on policies actually issued before the last mentioned date, may continue to be collected, and the claims arising thereon may be paid, and all business appertaining thereto may be transacted, and all proceedings appertaining thereto, either at law or in equity, may be continued or commenced and prosecuted; and the deposit at present in the hands of the Minister shall be dealt with under the law as it existed previously to the first mentioned date, as if this Act had not been passed.¹

33. When any company licensed under this Act desires to discontinue business and to have its assets in Canada released, and gives written notice to that effect to the Minister, it may, with the consent of the policy-holders, procure the transfer of its outstanding policies in Canada to some company or companies licensed under this Act in Canada, or may obtain the surrender of the policies, as far as is practicable :

2. The trustees may employ any portion of the assets vested in them for the purpose of effecting such transfer or surrender :

3. The company shall file with the Minister a list of all Canadian policy-holders whose policies have been so transferred or have been surrendered, and also a list of those which have not been transferred or surrendered :

4. The company shall, at the same time, publish in the *Canada Gazette* a notice that it will apply to the Minister for a release of its assets and securities on a certain day not less than three months after the date of the notice, and calling upon its Canadian policy-holders opposing such release to file their opposition with the Minister on or before the day so named :

5. After that day, upon the application for release being made, if the Minister, with the concurrence of the Treasury Board, is satisfied that such transfer or surrender has been effected, he may direct that a portion of the assets held by the trustees, or securities held by the Minister, shall be retained, sufficient in amount to cover the full equitable net surrender value of such policies (including bonus additions and accrued profits), as have not been transferred or surrendered, or in respect to which opposition has been filed, and may order the remaining assets or securities aforesaid to be released and transferred or paid over to the company :

6. The portion retained shall be tendered in the manner hereinafter described to the aforesaid policy-holders *pro rata*, according to the aforesaid values of their respective policies; and on the acceptance of the amount so tendered, such policies shall thereby be deemed to be cancelled; but if such tender is refused by any policy-holder, the amount so tendered may be paid over to the company, and the policy shall continue in force; and such policy-holder shall not be barred from any recourse

¹ See letter from the Minister of Justice, dated Ottawa, 17th December, 1891, to the Secretary of the Treasury Board, *in re* Connecticut Mutual Life Ins. Co., as reproduced in the Report of the Superintendent of Insurance (1891, p. xxxvii).

he has, either in law or in equity, against the company to compel the fulfilment of its contract under such policy :

7. The surrender values above mentioned shall be determined by the Superintendent on the basis stated in the twenty-fifth section of this Act, and he shall collect from the company the expenses of such valuation at the rate of three cents for each policy or bonus addition and shall pay the same to the Minister before the latter shall hand over the securities :

8. Nothing herein contained shall prevent any policy-holder from making special arrangements with the company whereby his policy may be continued in force; and, on proof being given of such arrangement, such policy may be omitted or removed from the above mentioned lists of policies, and this Act shall thereafter not apply in respect of such policy.

34. The tender referred to in the next preceding section shall be made in the following manner :—

(a.) A list and notice in the form D in the schedule to this Act, or to the like effect, shall be published in the *Canada Gazette* for at least thirty days previously to the day named in such notice ;

(b.) The company shall also cause the said list and notice to be published in such newspapers in Canada and for such length of time as the Minister determines ;

(c.) A notice in the form E in the schedule to this Act, or to the like effect, shall be sent by mail (postpaid or franked) from the office of the Superintendent to each of the policy-holders named in the said list, whose address is known to him, and such notice shall be deposited in some post-office in Canada at least thirty days previously to the day named therein, which shall be the same day as that named in the list and notice above mentioned ;

(d.) Any policy-holder who does not signify in writing to the Superintendent his acceptance of the amount so tendered, on or before the day named in the said notice, shall be deemed to have refused the same ; but the Minister may, at any time prior to the payment over to the company of the amount so refused, allow any policy-holder to signify his acceptance of such amount,—which acceptance, so allowed, shall have the same effect as if made on or before the day named in the said notice.

2. In this and the next preceding section the word 'policy-holder' means the person to whom the policy is issued and with whom the contract for assurance is made, and includes the assignee of such person.¹

35. In computing or estimating the reserve necessary to be held in order to cover its liability to policy-holders in Canada, each company may employ any of the standard tables of mortality as used by it in the construction of its tables, but there shall be set apart and credited to such reserve in each year out of the interest earned in the year, a sum equal to four and one-half per cent. per annum on the amount of the reserve as at the end of the preceding year, together with such further additions from premiums received during the year, if any, as shall be necessary to bring the reserve up to the standard provided by subsection ten of section twenty-five of this Act ; but if it appears to the Superintendent that the reserve as computed by the company falls below that above provided for, he shall report the same to the Minister, who may thereupon direct the Superintendent to compute, or to procure to be computed under his supervision, the reserve on the basis therein mentioned, and the amount so computed, if it differs materially from the return made by the company, may be substituted in the annual statement of assets and liabilities ; and in such case the company shall furnish to the Superintendent, on application, the full particulars of each of its policies necessary for such computation, and shall pay to the Superintendent an amount at the rate of three cents for each policy or bonus addition so computed, which amount he shall pay over to the Minister.

¹ The object of subsection two added to section thirty-four is to remove an existing doubt as to the person intended by the expression "policy-holder" in that and the next preceding section.

2. Any company instead of itself computing or estimating the reserve above mentioned, may require the same to be computed by the Superintendent on the basis stated in the twenty-fifth section of this Act, on payment of a like amount as is mentioned in the next preceding subsection :

3. Provided always, that in the case of any bonus addition or other profits on the policies of any company, accrued or declared before the twenty-eighth day of April, one thousand eight hundred and seventy-seven, and which have been heretofore valued on the basis of a rate of interest other than that above mentioned, such company may compute or have the same computed on such other basis ; and provided also, that in the case of any company which has heretofore based its computation or estimate of its reserve necessary to cover its liability to policy-holders in Canada (other than the reserve to cover the bonus additions or other profits in the last proviso mentioned) on a rate of interest of five per centum per annum, the basis or computation or estimate mentioned in the twenty-fifth section and in this section, shall not apply until the twenty-eighth day of April, one thousand eight hundred and eighty-seven, but such company may, until such date, compute such reserve, or have the same computed, at a rate of interest not exceeding five per centum per annum.

MUTUAL OR ASSESSMENT LIFE INSURANCE COMPANIES.

36. No company shall carry on within Canada any business of life insurance by promising to pay on the death of a member of such company, a sum of money solely from the proceeds of assessments or dues collected or to be collected from the members thereof for that purpose without being licensed or registered under this Act, except that, in the case of any contract entered into, or any certificate of membership or policy of insurance issued before the twentieth day of July, one thousand eight hundred and eighty-five, by any company carrying on such business, assessments may be made and collected, and claims paid, and all business connected therewith transacted without any penalty being incurred.

37. Any company incorporated or legally formed within Canada which transacts business of the nature described in the next preceding section may, at the discretion of the Minister, on report of the Superintendent approved by the Treasury Board, be exempted from the operation of the foregoing provisions of this Act, except those of sections twenty-five, twenty-seven, twenty-eight, twenty-nine, thirty and thirty-one, and be permitted to transact the business of life insurance on the conditions specified in the five sections next following.

38. Companies to be so exempted shall register their titles or corporate names in the office of the Superintendent ; they shall also make attested returns of their condition and affairs at such times and in such form, and attested in such manner, as are prescribed by the Minister, and the Superintendent shall include such returns in his annual report ; and any failure to make such returns, when called for by the Superintendent, shall subject such company, and any officer thereof, to the penalties mentioned in the twenty-first section of this Act :

2. The registration of any such company shall cease to be valid on the thirty-first day of March in each year, but shall be renewable from year to year, in the discretion of the Minister.

39. The provisions of this section shall apply to corporations or associations incorporated or legally formed elsewhere than in Canada for the purpose of carrying on the business of life insurance upon the co-operative or assessment plan :

2. Any such corporation or association may be licensed by the Minister, under the provisions of this Act, to transact business in Canada upon depositing with him fifty thousand dollars, and thereafter shall have the right to transact business so long as it continues to pay its losses to the full limit named in its certificates or policies, and has complied with all the requirements of this Act and of the Superintendent of Insurance :

3. In addition to such deposit of fifty thousand dollars, the Minister, upon the report of the Superintendent, approved by the Treasury Board, may, from time to time, require such other and further deposit as is recommended in such report and so approved, to be made by such companies or deposited with trustees to be named by the Minister, upon such trusts as are determined by the Governor in Council :

4. Death claims shall be a first charge on all moneys realized from assessments, and no deduction shall be made from any such death claims on any account whatsoever :

5. No portion of any moneys received from assessments for death claims shall be used for any expense whatever ; and every notice of any assessments shall truly specify the cause and purpose thereof :

6. Every application, policy and certificate, issued or used by any such company in Canada, shall have printed thereon in a conspicuous place, in ink of a colour different from that of the ink used in the instrument, and in good-sized type, the following words :

"This association is not required by law to maintain the reserve which is required of ordinary life insurance companies" :

7. Every certificate and policy shall contain a promise to pay the whole amount therein mentioned, out of the death fund of the association and out of any moneys realized from assessments to be made for that purpose, and every such association shall be bound forthwith and from time to time, to make assessments to an amount adequate with its other available funds, to pay all obligations created under any such certificate or policy without deduction or abatement :

8. The condition embodied in the next preceding subsection shall be inserted in every policy or certificate issued or delivered by any such company to any person insured in Canada :

9. In every policy issued by a company licensed in accordance with this section of this Act in favor of a resident of Canada, a clause shall either be embodied therein or endorsed thereon, to the effect that an action to enforce the obligation of such policy may be validly taken into any court of competent jurisdiction in the province wherein the policy-holder resides or last resided before his decease, and such policy shall not contain any provision inconsistent with such clause.

10. *No company which is authorized to assure or assures to any of its members a certain annuity, either immediate or deferred, whether for life or for a term of years, or any endowment whatever, shall be eligible for license as an assessment company under the foregoing provisions of this Act.*

11. *No company shall be eligible for license as an assessment company :¹*

(a.) *If a new company, until it has received at least five hundred applications for membership calling for an amount of insurance not less than five hundred thousand dollars, the procuring of which applications shall not be deemed a violation of the provisions of section twenty-two of this Act ; or*

(b.) *If a company already engaged in business, unless it has at least five hundred members or policy-holders holding policies for at least the sum of five hundred thousand dollars.*

40. The provisions contained in subsections four, five, six, seven, eight, ten and eleven of the next preceding section shall also apply to any company (not being such a company, society or association, as is referred to in section forty-three of this Act)

¹ Subsections ten and eleven, which have been added to section thirty-nine have reference to life companies which do business on the assessment plan. The first of these, subsection ten, explicitly provides that a company authorized to transact annuity or endowment business shall not be eligible for registration as an assessment company, such branches of business being admitted, by competent authorities on assessment insurance, to be unsuitable to companies of that class. Subsection eleven in effect provides that an assessment society shall not commence business until a considerable membership has been assured to it. The importance of such a provision, having regard to the nature of the business, is self-evident.

incorporated in Canada and carrying on the business of life insurance upon the co-operative or assessment plan.

41. The words "assessment system" shall be printed in large type at the head of every policy and every application for the same, and also in every circular and advertisement issued or used in Canada in connection with the business of a company to which any of the provisions of the five sections next preceding apply.

42. Every director, manager, agent or other officer of any such company as is hereinbefore lastly mentioned, which carries on business without being licensed or registered; and

(b.) Every person who transacts any business of insurance on behalf of any such company which so carries on business, without being registered or licensed; and

(c.) Every such company which neglects to print the words "assessment system" as provided by the next preceding section; and

(d.) Every director, manager, agent or other officer of such company and every other person who transacts business on behalf of any such company and who circulates or uses any application, policy, certificate, circular or advertisement on which the words "assessment system" are not printed as hereinbefore provided, shall be liable to the penalties mentioned in the twenty-second section of this Act.

43. Nothing contained in this Act shall apply to any society or association of persons for fraternal, benevolent, industrial or religious purposes, among which purposes is the insurance of the lives of the members thereof exclusively; or to any association for the purpose of life insurance formed in connection with such society or organization and exclusively from its members, and which insures the lives of such members exclusively:

2. Any society or association which is declared by this section to be exempt from the application of this Act, may, nevertheless, apply to the Minister to be allowed to avail itself of the provisions of the seven sections next preceding, and upon such application being assented to, such society or association shall cease to be so exempt by virtue of this section.¹

PROVISIONS RELATING TO FIRE AND INLAND MARINE INSURANCE.

44. The provisions of sections forty-five to forty-eight inclusive, apply only to fire and inland marine insurance companies and to other insurance companies carrying on fire and other insurance or inland marine and other insurance, in so far as relates to the fire or inland marine insurance business of such companies.

Forfeiture and Renewal of Licenses.

45. Whenever any company fails to make the deposits under this Act at the time required, or whenever written notice has been served on the Minister of any undisputed claim arising from loss insured against in Canada remaining unpaid for the space of sixty days after it becomes due, or of a disputed claim remaining unpaid after final judgment in a regular course of law and tender of a legal valid discharge, the license of such company may be withdrawn by the Minister.

46. Such license may be renewed, and the company may again transact business, if, within sixty days after notice to the Minister of the failure of the company to pay any undisputed claim, or the amount of any final judgment as provided in the next preceding section, undisputed claims or final judgments upon or against the company in Canada are paid and satisfied.

¹ See *Regina v. Stapleton*, *supra* § § 26 & 333, pp. 45 & 533; and letters from the Deputy Minister of Justice and the Superintendent of Insurance, dated Ottawa, 8th and 15th January, 1889, 23rd July, 1890, 7th January, 1891, and 19th May, 1891, respectively, in re "Oddfellows' Frat. Acc. Ass. of America," "Covenant Mut. Benefit Ass. of Illinois," "Northwestern Mas. Aid Ass.," "Prof. Mas. Mut. Acc. Ass. of America," and the "U. S. Mas. Benev. Ass. of Council Bluffs, Iowa," as reproduced in the Report of the Superintendent of Insurance (1891.) See also foot note page 46, *supra*.

Companies Ceasing to do Business and Release of Deposits.

47. When any company has ceased to transact business in Canada, and has given written notice to that effect to the Minister, it shall insure, on behalf of its Canadian policy-holders, all its outstanding risks, in some company or companies licensed in Canada, or obtain the surrender of the policies; and its securities shall not be delivered to the company until the same is done to the satisfaction of the Minister:

2. Upon making application for its securities, the company shall file with the Minister a list of all Canadian policy-holders who have not been so reinsured, or who have not surrendered their policies; and it shall at the same time publish in the *Canada Gazette* a notice that it has applied to the Minister for the release of its securities on a certain day, not less than three months after the date of the notice and calling upon its Canadian policy-holders opposing such release to file their opposition with the Minister on or before the day so named; and after that day, if the Minister, with the concurrence of the Treasury Board, is satisfied that the company has ample assets to meet its liabilities to Canadian policy-holders, he may order that all the securities be released to it or that a sufficient amount of them be retained to cover the value of all risks outstanding or respecting which opposition has been filed, and that the remainder be released; and therefore, from time to time, as such risks lapse, or proof is adduced that they have been satisfied, further amounts may be released on the authority aforesaid.¹

3. When a company has ceased to transact business in Canada after the notice hereby required, and its license has in consequence been withdrawn, such company may, nevertheless, pay the losses arising upon policies not reinsured or surrendered, as if such license had not been withdrawn.

FIRE POLICIES.

48. No fire policy shall be issued for or extend over a longer period than three years.

INSURANCE OTHER THAN LIFE, FIRE OR INLAND MARINE.

49. No company or person shall issue any policy other than a life, fire, or inland marine insurance policy, or receive any premium in respect thereof, or carry on any business of insurance other than life, fire, or inland marine insurance, without first obtaining a license from the Minister to carry on such business in Canada; the Treasury Board shall determine in each case what deposit shall be required to be made with the Minister, and the sections of this Act which shall apply to such company or person.²

2. The Treasury Board, upon the report of the Superintendent, may revoke any such license if sufficient cause therefor be shown by such report.

3. Any person receiving such license shall make annual statements under oath of such business at the same time and in the same form and manner as a company transacting the same business would under the provisions of this Act be required to make the same.

4. The Superintendent shall have the same powers with regard to a person receiving a license as are conferred on him by the Act with regard to insurance companies, and such person shall contribute towards the expenses of the office of the

¹ Proceedings for the release of the deposits under section forty-seven have been shortened, only the concurrence of the Treasury Board being now required, that of the Governor General in Council being hereafter unnecessary

² Under the forty-ninth section, as amended, a license is necessary in every case covered thereby, and such deposit as the Treasury Board shall determine must be made before such license is granted.

An order by the Governor General in Council is no longer necessary for the issue of a license under this section, the direction of the Treasury Board being sufficient for the purpose. Delays, hitherto unavoidable, will in consequence of the change be very greatly diminished.

Superintendent a sum in proportion to the gross premiums received in Canada during the previous year.

5. Every company or person carrying on any such business without obtaining such license, or after such license is revoked, or neglecting or refusing to make the statements required, and every person who delivers any policy or insurance or collects any premium on behalf of such company or person, shall respectively incur the penalties mentioned in the twenty-first and twenty-second sections of this Act.

6. This section shall not apply to companies carrying on in Canada ocean marine insurance business exclusively.

SCHEDULE.

FORM A.

DETAILS OF YEARLY STATEMENT—LIFE INSURANCE.

A list of the stockholders, with the amount subscribed for, the amount paid thereon, and the residence of each stockholder.

Property or Assets held by the Company, specifying Assets as per Ledger Accounts.

The value (as nearly as may be) of the real estate held by the company.

The amount secured by way of loan on real estate, whether by mortgages, bonds or any other security, distinguishing between those having first or second lien on such real estate.

The amount of loans secured by bonds or stock or other collaterals.

The amount of loans, as above, on which interest has not been paid within one year previous to such statement, with a schedule thereof.

The amount of loans made in cash to policy-holders on the company's policies assigned as collaterals.

Premium notes, loans or liens on policies in force, the reserve on each policy being in excess of all indebtedness thereon.

Par and market values of Canadian and other stocks and securities owned by the company, specifying in detail the amount, number of shares, and the par and market value of each kind.

Amount of cash at head office.

Amount of cash in banks, with details.

Bills receivable.

Agents' ledger balances.

Other Assets.

Interest due and accrued.

Rents due and accrued.

Due from other companies for losses or claims on policies of the company reinsured.

Net amount of uncollected and deferred premiums.

Commuted commissions.

All other property owned by the company, with details.

Liabilities.

Net present value of all outstanding policies in force, with mode of computation or estimation, deducting those reinsured.

Premium obligations in excess of net values of their policies.

Claims for death losses and matured endowments, and annuity claims, due and unpaid, or in process of adjustment, or adjusted but not due, or resisted.

Dividends to stockholders, and dividends of surplus or other profits to policy-holders, due and unpaid.

Amount due on account of office expenses.

Amount of loans.

Amount of all other claims against the company.

Income.

Amount of cash premiums received, less reinsurance. Premium notes, loans or liens taken in part payment for premiums; and premiums paid by dividends, including reconverted additions, and by surrendered policies.

Cash received for annuities.

Amount of interest received.

Amount received for rents.

Net amount received for profits on bonds, stocks and other property actually sold.

All other income in detail.

Premium Note Account.

Premium notes, loans or liens on hand at date of last previous statement.

Additions and deductions in detail during the year.

Balance, note assets at date.

Expenditure.

Total amount actually paid for losses and matured endowments.

Cash paid to annuitants and for surrendered policies.

The same voided by lapse.

Cash surrender values, including reconverted additions applied in payment of premiums.

Dividends paid to policy-holders, or applied in payment of premiums.

Premium notes, loans or liens used in payment of dividends to policy holders.

Cash paid stockholders for interest or dividends.

Cash paid for commissions, salaries and other expenses of officials.

Cash paid for taxes, licenses, fees or fines.

All other expenditures in detail.

Exhibit of Policies.

Number and amount of policies and additions in full at the end of the previous year.

New policies and changes.

Policies terminated, and the manner of termination.

Number and amount of policies in force at date of statement.

Reinsurances.

FORM B.

DETAILS OF ANNUAL STATEMENTS—FIRE AND INLAND MARINE INSURANCE.

A list of the stockholders, with the amount subscribed for, the amount paid thereon, and the residence of each stockholder.

The Property or Assets held by the Company, specifying,—

The value (as nearly as may be) of the real estate held by such company;

The amount of cash on hand and deposited in banks to the credit of the company—specifying in what banks the same are deposited, with amounts separately;

The amount of cash in the hands of agents;

The amount of loans secured by bonds and mortgages constituting either a first or second lien on real estate, in separate schedules;

The amount of loans on which interest has not been paid within one year previous to such statement, with a schedule thereof;

The amounts due the company for which judgments have been obtained ;

The amount of Canadian stocks held by the company, and of any other stocks owned by the company, specifying in detail the amount, number of shares, and par and market value of each kind of stock owned by the company absolutely ;

The amount of stocks held as collateral security for loans, with the amount loaned on each kind of stock, its par and market value ;

The amount of assessments on stock and premium notes, paid and unpaid ;

The amount of interest actually due and unpaid ; also the amount of interest accrued and unpaid ;

The amount of premium notes on hand on which policies are issued, with amount paid thereon ; also bills receivable held by the company and considered good, the amounts of each class separately, and the amounts on each class overdue ;

The amount of all other property belonging to the company, with a detail thereof.

The Liabilities of the Company, specifying,—

The amount of losses due and yet unpaid ;

Amount of losses adjusted, but not due ;

Amount of losses incurred during the year, including those claimed, not yet adjusted, and of those reported to the company upon which no action has been taken—the amounts of each class separately, carrying out the totals in one sum ;

Amount of claims for losses resisted by the company, distinguishing those in suit ;

Amount of dividends declared and due, and remaining unpaid ;

Amount of dividends declared, but not yet due ;

Amount of money borrowed, and security given for payment thereof—stating each loan separately, and the interest paid therefor ;

The amount of unearned fire premiums ;

Amount of unearned inland marine premiums ;

Amount received for marine (ocean) premiums, not marked off ;

Amount of all other claims against the company, with a detailed statement thereof ;

Aggregate amount of all unpaid losses, claims and liabilities whatsoever, except capital stock.

Income of the Company, specifying,—

Amount of cash premiums received, less reinsurance ;

Amount of notes received for premiums, less reinsurance ;

Amount of interest money received ;

Amount of income received from all other sources.

Expenditure of the Company, specifying,—

Amount paid for losses which occurred prior to the first day of January last, deducting savings and salvage, which losses were estimated in the last statement at \$;

Amount paid for losses which occurred during the year, deducting savings and salvage ;

Total amount actually paid during the year for losses in each branch, in separate columns ;

Amount and rate of dividends paid during the year ;

Amount of expenses paid during the year, including commissions and fees to agents and officers of the company ;

Amount of all other payments and expenditures, with details thereof.

Miscellaneous.

Gross amount of risks taken during the year, original and renewal, in each

branch of the company's business separately—deducting amount of reinsurance effected thereon in each branch separately;

And amount of risks in force at end of the year in each branch of the company's business, deducting reinsurance; and showing at foot, in separate columns, the net amount of risks then in force.

FORM C.

Form of Declaration to accompany the Statement.

Province of
County of

Secretary of
President, and

Company being duly sworn, depose and say, and each for himself says, that they are the above described officers of the said company, and that on the day of last all the above described assets were the absolute property of the said company, free and clear from any liens or claims thereon, except as above stated, and that the foregoing statement, with the schedules and explanations hereunto annexed and by them subscribed, are a full and correct exhibit of all the liabilities, and of the income and expenditure, and of the general condition and affairs of the said company, on the said day of last, and for the year ending on that day, according to the best of their information, knowledge and belief, respectively.

Subscribed and sworn to before me, this
A.D. 18 .

Signatures. day of

FORM D.

In the matter of the (*here insert name of the company*).

Notice is hereby given that the Minister of Finance has, pursuant to the thirty-third and thirty-fourth sections of "*The Insurance Act*," directed assets to be retained, sufficient in amount to cover the full equitable and surrender value of the policies in the above company (including bonus additions and accrued profits) which have not been transferred or surrendered or in respect of which opposition has been filed as provided by the said thirty-third section; and the assets so retained are hereby tendered to the aforesaid policy-holders *pro rata* according to the aforesaid values of their respective policies. A list of such policy-holders and of the amounts tendered to them respectively is hereinunder given, and notice is hereby given that any policy-holder not signifying in writing to the Superintendent of Insurance his acceptance of the amount hereby tendered to him on or before the day of , A.D. 18 , shall be deemed to have refused the same, and the amount tendered may, pursuant to the said Act, be paid over to the company.

List of policy-holders and amounts tendered :

Name.	Address so far as known.	Amount and number of policies.	Amount tendered.
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Dated at Ottawa, this
A.D. 18 .

day of

(Signed,)

*Minister of Finance,
Canada.*

(Signed,)

Superintendent of Insurance.

FORM E.

OFFICE OF THE SUPERINTENDENT OF INSURANCE,

DEPARTMENT OF FINANCE,

Ottawa,

18 .

In the matter of the (*here insert the name of the company.*).

You are hereby notified that the Minister of Finance has, pursuant to the thirty-third section of "*The Insurance Act*," directed assets to be retained sufficient in amount to cover the full equitable net surrender value of the policies in the above company, including bonus additions and accrued profits which have not been transferred or surrendered, or in respect to which opposition has been filed as provided by the said thirty-third section. The assets so retained are tendered to the aforesaid policy-holders *pro rata* according to the aforesaid values of their respective policies.

The amount hereby tendered to you, and the policy or policies in respect of which the same is tendered, are given below, and you are hereby notified that unless on or before the day of A.D., 18 , you signify in writing to the Superintendent of Insurance your acceptance of the amount hereby tendered, you shall be deemed to have refused the same, and the amount tendered may, pursuant to the said Act, be paid over to the company.

Yours, &c.,

(Signed,)

Superintendent of Insurance.

Name.	Number and amount of policy.	Amount tendered.
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EXTRACT FROM THE REPEALED STATUTE 34 VIC.

CHAP. IX.

(These sections are referred to in clause 4, sec. 10 of the Insurance Act.)¹

4. Upon the insolvency of any company, the court having jurisdiction in the province (or sitting in the district if such province be the Province of Quebec) where the chief agency in Canada of such company is situated, shall appoint an assignee or assignees, who shall forthwith call upon the company to furnish a statement of all its outstanding policies in Canada, and upon all policy-holders to file their claims; and upon the filing of the claims before the assignees, the parties interested shall have the same right of contestation, and the assignee shall have the same powers in respect thereof, subject to the same right of appealing from their decision to the same tribunals, as is provided for in similar cases by the Insolvent Act of 1869; and in case of any fire insurance company becoming insolvent, the parties insured shall be entitled to claim for a part of the premium paid proportionate to the unexpired period of their policies respectively, and such return premium shall rank with judgments obtained and claims accrued, in the distribution of the assets; and in the case of a life insurance company the assignee or assignees may insure all outstanding Canadian policies with some company licensed to transact business in Canada, advertising for tenders to that effect; and if the amount of the deposit be not enough so to reinsure all policies to the full amount, and to meet all judgments against the company, and claims accrued, the assignees may insure them for such a percentage of the risks as the amount at their disposal may admit of, such reinsurance ranking *pro rata* with judgments and claims accrued; and the court having jurisdiction, as above provided, may order a sufficient amount of the securities to

¹ *Supra* page 699.

be sold to meet such reinsurance. If the assignees are unable to reinsure in full or in part all outstanding Canadian policies as a whole, they shall appoint a competent actuary, and shall ascertain the reinsurance value of each policy according to the tables which on the report of the Treasury Board may be sanctioned by the Governor in Council for that purpose, and upon the completion of the schedule to be prepared by the assignees, of all judgments against the company, and of all claims for reinsurance or for surrender of the policy as aforesaid, the court having jurisdiction, as above provided, shall cause the securities held by the Receiver General for such company, or any part of them, to be sold in such manner and after such notice and formalities as the court may appoint, and the proceeds thereof, after paying the expenses incurred, shall be distributed *pro rata* amongst the claimants according to such schedule, and the balance, if any, shall be surrendered to the company. But if any loss shall be sustained or any claim shall arise after the statement of outstanding policies has been obtained from the company, as hereinbefore provided, and before the final order of the court for the distribution of the proceeds of the securities, or if the proceeds of the securities shall not be sufficient to cover in full all claims recorded in the schedule, the policy-holders shall not be barred from any recourse they may have either in law or equity against the company issuing the policy, other than that for a share in the distribution of the proceeds of the securities held for such company by the Receiver General.

5. When any company has ceased to transact business in Canada, and has given the notice required by this Act to that effect, before its securities can be given up to it, it must insure on behalf of its Canadian policy-holders, all outstanding risks in some company or companies licensed in Canada, or obtain the surrender of the policies. Upon making application for its securities, the company must file with the Minister of Finance a list of all Canadian policy-holders who have not been so insured or have not surrendered their policies, and it must at the same time publish in the *Canada Gazette* a notice that it has applied to Government for the release of its securities on a certain day, not less than thirty days after the date of the notice, and calling upon its Canadian policy-holders opposing such release to file their opposition with the Minister of Finance on or before the day so named; and after that day, if the Treasury Board is satisfied that the company has ample assets to meet its liabilities, all the securities may be released to it by an Order of the Governor in Council, or a sufficient amount of them may be retained to cover the value of all risks respecting which opposition has been filed, and the remainder may be released, and thereafter, from time to time, as such opposing risks may lapse or proof may be adduced that they have been satisfied, further releases may be made on the authority aforesaid; and after a company has ceased to transact business in Canada after the notice hereby required, and its license has in consequence been withdrawn, such company may nevertheless continue to receive the premiums coming due on policies not reinsured or surrendered, and may pay the losses arising thereon, as if such license had not been withdrawn.

ACT PASSED BY THE DOMINION PARLIAMENT, 58-59 VICTORIA.

CHAP. XX.

An Act further to amend the Insurance Act. (Assented to 22nd July, 1895).

1. (This section has been inserted *supra* page 702, s. 20, ss. 1 & 7).

2. The words "annual statement" in the section substituted by section eight of chapter twenty of the Statutes of 1894 for section twenty-one of *The Insurance Act* shall, in the case of companies incorporated or legally formed elsewhere than in

Canada, be deemed to include both the statement of the Canada business and the statement of the general business provided for in the subsection hereby substituted for subsection one of section twenty of *The Insurance Act*, as amended by chapter twenty of the Statutes of 1894.

3. The renewals of licenses under *The Insurance Act* for the year now current are hereby confirmed, and any penalties incurred with respect to the statements of general business required to be filed in pursuance of the said Act are hereby remitted.

4. Notwithstanding anything in *The Insurance Act* contained, subsection two of section thirty-nine thereof shall apply to companies incorporated or legally formed in Canada for the purpose of carrying on the business of life insurance on the assessment plan; Provided, that this section shall not interfere with the renewal of certificates of registration heretofore granted.

5. (This section has been inserted *supra* page 696, s. 4, ss. 2).¹

ACT PASSED BY DOMINION PARLIAMENT, 58-59 VIC., CHAP. XIX. (1895).

An Act to authorize the Treasury Board to exempt certain societies from the operation of the Insurance Act.

This Act consists of a single section, and is as follows:—

“1. In any case to which section forty-three of the Insurance Act does not apply, the Treasury Board may exempt from the provisions of the said Act any society or organization of persons for fraternal, benevolent, industrial or religious purposes,

¹ The new subsection one of section twenty, enacted by section one of this Act, differs from the repealed subsection by the addition of the words in italics, the object of which is to make it clear that all companies, incorporated elsewhere than in Canada, must file statements of their general business in the office of the superintendent, even though they are not required by law to furnish statements of such general business to the government of the country where their head offices are situate.

The subsection seven of section twenty, which section one of this Act repeals, required the statements of the general business of companies incorporated or formed elsewhere than in Canada as well as their statements of Canadian business to be filed in the office of the superintendent not later than the first day of March in each year. As will be observed, the new subsection extends the time for filing the statements of general business so that such general statements need not be filed earlier than the first day of May, nor shall they be filed later than the 30th day of June. Some of the British companies found it absolutely impossible to deposit their statements at so early a date as the first of March, but they will have no difficulty in complying with the requirements of the amended subsection seven.

The second section of the Act was rendered necessary by the fact that, in the case of companies other than Canadian companies, there will hereafter be two statements deliverable at different times, and the object of the section is to make it clear that default in the delivery of either would render a company liable to the penalty provided for in section twenty-one of the Act.

As already stated some companies were unable, notwithstanding their utmost efforts, to comply with the provisions of the statute regarding the delivery of general statements, as it stood prior to the amendment, and penalties having been incurred by them, the third section was enacted to relieve them from such penalties and confirm the renewals of their licenses.

The fourth section of the Act introduces an important change regarding the licensing of Canadian Assessment Life Companies. Heretofore such companies have received certificates of registration and have been permitted to carry on the business of life insurance on the assessment plan without making any deposit with the Receiver General. The effect of this section is to require a deposit of \$50,000 from Canadian companies, as well as others, before the issue of a license; and hereafter no company of any kind can be licensed under the Insurance Act without making a deposit. The section does not, however, interfere with the renewal of certificates of registration granted before the 22nd July, 1895, the date the Act under consideration was assented to.

The fifth section of the Act, which was added in the Senate, needs no comment.

among which purposes is the granting of life, accident, sickness or disability insurance to the members thereof exclusively—or any association for the purpose of life, accident, sickness or disability insurance—or any one or more of such kinds of insurance, formed in connection with such society or organization and exclusively from its members, and which insures such members exclusively,—upon its being established to the satisfaction of the Treasury Board that the occupation of the members of such society or association is of such a hazardous nature that they are either wholly unable to obtain insurance in the licensed insurance companies or are able to obtain it only to a limited extent, and upon the payment of very high premium.”

Under it the Treasury Board have authority to exempt from the operation of the Insurance Act, any society formed for fraternal, benevolent, industrial or religious purposes among which is the granting of insurance to the members thereof as mentioned in the section, upon satisfactory evidence being furnished that the occupation of the members of such society is of such a hazardous nature that they cannot obtain insurance from the regular licensed companies, or can only obtain such insurance at very high premiums and to a limited amount. It may be mentioned that any application for exemption under the Act must be supported by satisfactory proof in the form of affidavits or statutory declarations, showing the nature and objects of the society, verifying its constitution, by-laws and proposed form of contract, and proving the hazardous nature of the employment of the members, and their inability to obtain insurance, etc., as in the Act set forth.

QUEBEC ENACTMENTS.

CIVIL CODE OF LOWER CANADA.—TITLE FIFTH.

Of Insurance.—Chapter First.

GENERAL PROVISIONS.

SECTION I.

2468. Insurance is a contract whereby one party, called the insurer or underwriter, undertakes, for a valuable consideration, to indemnify the other, called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event.

2469. The consideration or price which the insured obliges himself to pay for the insurance is called the premium. It does not belong to the insurer until the risk begins, whether he has received it or not.

2470. Marine insurance is always a commercial contract; other insurances are not by their nature commercial, but they are so when made for a premium by persons carrying on the business of insurers; subject to the exception contained in the next following article.

2471. Mutual insurance is not commercial. It is governed by special statutes, and by the general rules contained in this title, in so far as they are applicable and not inconsistent with such statutes.

2472. All persons capable of contracting may insure objects in which they have an interest, and which are subject to risk.

2473. Incorporeal things, as well as corporeal, and also human life and health, may be the object of insurance.

2474. A person has an insurable interest in the object insured whenever he may suffer direct and immediate loss by the destruction or injury of it.

2475. The interest insured must exist at the time of the loss unless the policy contains the stipulation of lost or not lost.

This rule is subject to certain exceptions in life insurance.

2476. Insurance may be made against all losses by inevitable accident, or irresistible force, or by events over which the insured has no control; subject to the general rules relating to illegal and immoral contracts.

2477. The insurer may effect a re-insurance, and the insured may insure the solvency of the first insurer.

2478. In case of loss the insured must, with reasonable diligence, give notice thereof to the insurer; and he must conform to such special requirements as may be contained in the policy with respect to notice and preliminary proof of his claim unless they are waived by the insurer.

If it be impossible for the insured to give notice or to make the preliminary proof, within the delay specified in the policy, he is entitled to a reasonable extension of time.

2479. Insurance is divided with respect to its object and the nature of the risks, into three principal kinds :—

1. Marine insurance ;
2. Fire insurance ;
3. Life insurance.

2480. The contract of insurance is usually witnessed by an instrument called a policy of insurance.

The policy either declares the value of the thing insured, and is then called a valued policy, or it contains no declaration of value, and is then called an open policy.

Wager or gaming policies, in the object of which the insured has no insurable interest, are illegal.

2481. The acceptance of an application for insurance constitutes a valid agreement to insure, unless the insurer is required by law to contract in another form exclusively.

2482. Policies of insurance may be transferred by indorsement and delivery, or by delivery alone, subject to the conditions contained in them. But marine policies and fire policies can be transferred only to persons having an insurable interest in the object of the policy.

2483. In the absence of consent or privity on the part of the insurer, the simple transfer of the thing insured does not transfer the policy.

The insurance is thereby terminated, subject to the provisions contained in article 2576.¹

2484. The announcements and clauses which are essential or usual in policies of insurance, are declared in articles hereinafter contained relating respectively to the different kinds of insurance.

SECTION II.

2485. The insured is obliged to represent the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the under-taking of it, or affect the rate of premium.

2486. The insured is not obliged to represent facts known to the insurer, or which from their public character and notoriety he is presumed to know ; nor is he obliged to declare facts covered by warranty express or implied, except in answer to inquiries made by the insurer.

2487. Misrepresentations or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.

2488. Fraudulent misrepresentation or concealment on the part either of the insurer or of the insured is in all cases a cause of nullity of the contract in favor of the innocent party.

2489. The obligation of the insured with respect to misrepresentation is satisfied when the fact is substantially as represented and there is no material concealment.

SECTION III.

2490. Warranties and conditions are a part of the contract and must be true if affirmative, and if promissory must be complied with ; otherwise the contract may be annulled, notwithstanding the good faith of the insured. They are either express or implied.

2491. An express warranty is a stipulation or condition expressed in the policy, or so referred to in it as to make part of the policy. Implied warranties will be designated in the following chapters relating to different kinds of insurance :

¹ *Infra* p. 729.

CHAPTER II. OF MARINE INSURANCE.

SECTION I.

This chapter is inserted as many of its provisions are applicable to fire and life contracts.¹

2492. The policy of marine insurance contains :

The name of the insured or of his agent ;

A description of the object insured, of the voyage, of the commencement and termination of the risk, and of the perils insured against ;

The name of the ship and master, except when the insurance is on a ship or ships generally ;

The premium ;

The amount insured ;

The subscription of the insurer, with its date.

It also contains such other clauses and announcements as the parties may agree upon.

2493. Insurance may be made on ships, on goods, on freight, on bottomry and respondentia loans, on profits and commissions, on premiums of insurance, and on all other things appreciable in money and exposed to the risks of navigation, with the exception of seamen's wages, upon which insurance cannot be legally made, and subject to the general rules relating to unlawful and immoral contracts.

2494. Insurance may be made for any kind of voyage or transport by sea, river or canal navigation, and either for the whole voyage or for a limited time.

2495. The risk of loss or damage of the thing insured by perils of the sea is essential to the contract of marine insurance.

The risks usually specified in the policy are tempest and shipwreck, stranding, collision, unavoidable change of the ship's course, or of her voyage, or of the ship itself, fire, jettison, plunder, piracy, capture, reprisal and other casualties of war, detention by order of a sovereign power, barratry of the master and mariners, and generally all other perils and chances of navigation by which loss or damage may arise. The parties may limit or extend the risks by special agreement.

2496. If the time of the commencement and termination of the risk be not specified in the policy, it is regulated according to article 2508.²

2497. Marine policies in cases of doubtful meaning are construed by the established and known usage of the trade to which the policy relates ; such usage is held to be a part of the policy when it is not otherwise expressly provided.

2498. An insurance made after the loss or the arrival of the object of it, is null, if at the time of insuring, the insured had a knowledge of the loss, or the insurer of the arrival. Such knowledge is presumed where information might have been received in the usual course and at the usual rate of transmission.

SECTION II.

2499. The principal obligations of the insured relate :

To the premium ;

To representation and concealment ;

To warranties and conditions ;

To abandonment, which is treated in the fifth section.

2500. The insured is obliged to pay the amount or rate of premium agreed upon, according to the terms of the contract.

If the time of payment be not specified, it is payable without delay.

¹ C. C. 2504 and 2585, *infra* pp. 729 & 730. ² *Infra* p. 731.

2501. In the following cases the premium is not due, and if it have been paid it may be recovered back, the contract being void.

1. When the risk insured against does not occur, either by reason of the entire breaking up of the voyage before the departure of the ship, or for other causes, even those arising without fraud from the act of the insured ;

2. When there is a want of insurable interest, or any other course of nullity, without fraud on the part of the insured.

The insurer in these cases is entitled to one half per cent. on the sum insured, for his indemnification, unless the policy is illegal, or rendered null by fraud, misrepresentation or concealment on his part.

If the policy be illegal there is no right of action for the premium, and none to recover it back if it have been paid.

2502. The preceding article applies when the risk occurs for part only of the value insured for the non-payment or return of a proportional part of the premium, according to circumstances and the discretion of the court.

2503. The rules concerning representation, and the effect of misrepresentation or concealment, are declared in chapter one, section two.

2504. The general rules relating to warranties are contained in chapter one, section three.

2505. It is an implied warranty in every contract of marine insurance that the ship shall be sea-worthy at the time of sailing. She is sea-worthy when she is in a fit state, as to repairs, equipments, crew, and in all other respects, to undertake the voyage.

2506. In insurance for a ship-owner it is an implied warranty that the ship shall be properly documented and conducted according to the laws and treaties of the country to which she belongs, and to the law of nations.

SECTION III.

2507. The principal obligation of the insurer is to pay to the insured all losses suffered by him by reason of any of the risks insured against, according to the terms of the contract. His liability is subject to the rules contained in the foregoing section and to the rules and conditions hereinafter declared.

2508. The insurer is not liable for any losses suffered after a deviation or change of the risk made without his consent, by changing, contrary to the established usage, the ship's course or the voyage, or the ship itself, by the order of the insured, unless the deviation or change is of necessity, or for the purpose of saving human life. The insurer is nevertheless entitled to the premium if the risk has commenced.

2509. The insurer is not liable for loss or damage arising from intrinsic defect in the thing, or caused by the culpable act or gross negligence of the insured.

2510. The insurer is not liable for any loss by barratry of the master or mariners unless there is an agreement to the contrary.

2511. Barratry is any act of wilful misconduct by the master or mariners whereby loss is caused to the owners or freighters.

2512. The insurer is not liable for the ordinary charges known as petty averages, such as pilotage, towage, tonnage, anchorage, clearance, or duties imposed upon the ship or cargo.

2513. The limitation of the insurer's liability, for particular average under a certain amount and for the loss or damage of certain articles enumerated in the common memorandum of warranty to be free from average, is regulated by the terms of such memorandum contained in the policy. If there be no memorandum of warranty, the general rules declared in this title apply.

2514. A contract of insurance made fraudulently on the part of the insured for a sum exceeding the value of the object of it, may be annulled by the insurer, who in such case is entitled to one half per cent. upon the amount insured.

2515. If in the case specified in the last preceding article there be no fraud, the contract is valid to the amount of the value of the object insured.

The insurer is not entitled to the full premium upon the amount insured in excess of the value, but to one half per cent. only.

2516. If there be several contracts of insurance effected without fraud upon the same object, and against the same risks, and the first contract insures the full value of the object, it alone can be enforced. The subsequent insurers are free from liability and are bound to return the premium, reserving a half per cent.

Subject nevertheless to such special agreements and conditions as may be contained in the policy of insurance.

2517. When in the case specified in the last preceding article the total value of the object is not insured by the first contract, the subsequent insurers are liable for the surplus according to the date of their respective contracts; subject to the same restriction.

2518. If the subsequent insurance be fraudulent on the part of the insured, he is obliged to pay the whole premium on such insurance, but is not entitled to recover anything upon it.

2519. When there is a partial loss of an object insured by several insurances to an amount not exceeding its full value, the insurers are liable for it, rateably in proportion to the sums for which they have respectively insured.

2520. When the insurance is made separately upon goods to be laden in different ships, if all the goods be placed in one of the ships or in any number of them less than the whole, the insurer is liable only for the sum insured on the goods, which under the contract were to be placed in such ship or ships, although all the ships specified in the contract be lost. He is entitled nevertheless to one half per cent. of premium upon the remainder of the total amount insured.

SECTION IV.

2521. Loss for which the insurer is liable is either total or partial.

2522. Total loss may be either absolute or constructive. It is absolute when the thing insured is wholly destroyed or lost. It is constructive when by reason of any event insured against, the thing though not wholly destroyed or lost becomes of little or no value to the insured, or the voyage and adventure are lost or rendered not worth pursuing.

Before the insured can claim for a constructive total loss he must make an abandonment as declared in the following section.

2523. All losses not included within the meaning of the last preceding article are partial losses.

2524. When a loss by collision occurs by a fortuitous event without either party being in fault, it falls upon the injured ship without recourse against the other, and is a loss by the perils of the sea for which the insurer is liable under the general terms of the policy.

2525. When the collision is caused by the fault of the master or mariners of one of the ships, the party in fault is liable to the other, and if the insured ship be the one injured by the fault of the master or mariners of the other, the insurer is liable under the general clause, but if the injury be caused by the fault of the master or mariners of the insured ship, the insurer is not liable. If the fault amounts to barratry it is subject, in so far as the insurer is concerned, to the provision contained in article 2510.¹

2526. If the cause of the collision be unknown or it is impossible to determine by whose fault it was caused, the damages are borne in equal portions by both ships; the insurer is liable in such cause under the general clause.

2527. Extraordinary expenses necessarily incurred for the sole benefit of some particular interest as for the ship alone or for the cargo alone, and damages sustained by the ship alone or the cargo alone, and not voluntarily suffered for the

¹ *Supra* p. 724.

common safety, are particular average losses for which the insurer is liable to the insured under the general terms of the policy, when these losses are caused by the perils of the sea.

2528. Loss by salvage is a loss by the perils of the sea for which the insurer is liable under the general terms of the policy. Special rules relating to salvage are contained in the Merchant Shipping Act, 1854.

2529. The rules concerning loss by average contribution are contained in the sixth section of this chapter.

2530. When in the course of the voyage the ship becomes disabled from completing it, the master is bound to procure another vessel for conveying the cargo to the place of destination, if it can be done with advantage to the parties interested; and in such case the liability of the insurer continues after the cargo is transhipped for that purpose.

2531. The insurer is also liable in the case provided in the last preceding article for damages, expenses of discharging, storage, reshipment, freight and all other costs not exceeding the amount insured.

2532. If in the case provided in article 2530 the master be unable to procure another vessel within a reasonable time for conveying the cargo to its destination, the assured may make an abandonment of it.

2533. In insurance by an open policy the value of the ship is held to be that which she bears at the port where the voyage begins, including whatever adds to her permanent value or is necessary to prepare her for the voyage, and also the costs of insurance.

2534. The value of the goods insured by open policy is established by the invoice, or if that cannot be done is estimated according to their market price at the time of landing; all charges and expenses incurred up to that time, together with the premium of insurance, are included.

2535. The amount for which the insurer is liable on a partial loss is ascertained by comparing the gross produce of the damaged sales with the gross produce of the sound sales, and applying the percentage of difference to the value of the goods as specified in the policy, or established in the manner provided in the last preceding article.

2536. The insured is bound when he makes claim for any loss, to declare, if thereunto required, all other insurances effected by him on the thing insured, and also the loans taken by him on bottomry and respondentia.

He cannot claim payment for the loss until such declaration is made, when so required, and if the declaration be false and fraudulent he loses his right to recover.

2537. The insured is bound to do in good faith all in his power between the time of loss and the abandonment to save the effects insured. His acts and those of his agents done for that purpose are for the benefit of the insurer and at his expense and risk.

SECTION V.

2538. The insured may make an abandonment to the insurer of the thing insured in all cases of its constructive loss, and may thereupon recover as for a total loss. Without abandonment he is entitled in such cases to recover as for a partial loss only.

2539. An abandonment cannot be partial or conditional. It extends, however, only to the property actually at risk at the time of the loss.

2540. If different things or classes of things be insured by the same policy and separately valued, the right to abandon may exist, in respect to a part separately valued, as well as in respect to all.

2541. The abandonment must be made within a reasonable time after the assured has received intelligence of the loss.

If from the uncertainty of the intelligence or the nature of the loss further inquiry and investigation be required to enable the insured to determine whether he

will abandon or not, reasonable delay for that purpose is allowed according to circumstances.

2542. If the insured fail to abandon within a reasonable time, as provided in the last preceding article, he is held to have waived the right to do so and can only recover as for a partial loss.

2543. The abandonment is made by a notice given by the insured to the insurer of the loss, and that he abandons to the latter all his interest in the thing insured.

2544. The notice of abandonment must be explicit and must contain a statement of the grounds of abandonment. These grounds must exist and be sufficient at the time of the notice.

2545. Abandonment on the ground of the ship being disabled by stranding cannot be made if she can be raised and put in a condition to continue her voyage to the place of destination.

In such case the insured has his recourse against the insurer for the expense and loss occasioned by the stranding.

2546. If a ship has not been heard of within a reasonable time after sailing, or after the reception of the last intelligence of her, she is presumed to have foundered at sea, and the insured may make an abandonment and recovery for a constructive total loss. The time necessary for raising such presumption is determined by the court according to the circumstances of the case.

2547. Abandonment made and accepted is equivalent to transfer, and the thing abandoned with the rights pertaining to it becomes from the time of abandonment the property of the insurer.

The acceptance may be either express or implied.

2548. On an accepted abandonment of the ship, the freight earned after the loss belongs to the insurer of the ship; that earned previously to the loss belongs to the ship-owner or to the insurer on freight to whom it is abandoned.

2549. Abandonment made upon sufficient ground and accepted, is binding on both parties. It cannot be defeated by any subsequent event, or revoked otherwise than by mutual consent.

2550. If the insurer refuse to accept a valid abandonment, he is liable as for an absolute total loss, deducting from the amount any proceeds of the thing abandoned which have been applied to the benefit of the insured.

SECTION VI.

2551. In the absence of special agreement between the parties, average contributions are regulated by the following articles of this section, and, when these do not apply, by the usage of trade.

The insurer is bound to reimburse the insured the amount of his contribution not exceeding the sum insured.

2552. Contribution by the ship and freight and by the goods whether saved or lost, rateably and according to their respective values, is made for damages voluntarily sustained and extraordinary expenses incurred, for the common safety of the ship and cargo.

These are called general or gross average losses, and are as follows :—

1. Money or other things given as a compensation to pirates to ransom the ship and cargo, or as salvage to recaptors;
2. Loss by jettison;
3. Masts, cables, anchors, or other furniture of the ship, cut away, destroyed or abandoned;
4. Damages caused by jettison to the goods which remain in the ship or to the ship itself;
5. The wages and maintenance of seamen, during the detention of the ship in the course of her voyage, by a sovereign power, and during the necessary repairs of injuries of a nature to give rise to average contribution;

6. The expense of unloading, to lighten the ship and enable her to enter a port of refuge or river, when she is compelled to do so by storm or by the pursuit of an enemy;

7. Loss and expenses arising from the voluntary stranding of the ship for the purpose of escaping total loss or capture.

And in general all damages voluntarily suffered and extraordinary expenses incurred for the common safety of the ship and cargo from the time of loading and departure of the ship to the time of her arrival and discharge at the port of destination.

2553. Jettison gives rise to contribution only when it is made in imminent peril and is necessary for the preservation of the ship and cargo.

It may be of the cargo, or of the provisions, tackle or furniture of the ship.

2554. Jettison must be first made of things the least necessary, the most weighty and of the least value.

2555. The ship's warlike stores and provisions, and the clothes of the crew, do not contribute, but the value of those lost by jettison is paid by contribution upon other effects generally.

The baggage of passengers does not contribute. If lost it is paid by contribution in which it shares.

2556. Goods for which there is no bill of lading or acknowledgment by the master, or which are put on board contrary to the charter-party, are not paid for by contribution if lost by jettison. They contribute if saved.

2557. Goods carried on deck, which are lost or damaged by jettison, are not paid for by contribution, unless they were so carried in conformity with an established usage and course of trade. They contribute if saved.

2558. In case of average contribution the ship and freight are estimated at their value at the port of discharge.

The goods lost as well as those saved are estimated in like manner, deducting freight, duties and other charges.

2559. Notwithstanding the rule of valuation contained in the last preceding article, the amount which the insurer is liable to reimburse to the assured for his contribution is regulated by the value which the ship or goods bear according to articles 2533 and 2534,¹ or by the sum specified in the valued policy, and not by their contribution value.

2560. No contribution is made for particular average losses. They are borne by the owner of the thing which has suffered the damage or occasioned the expense; saving his recourse against the insurer as declared in article 2527.²

2561. If the ship be not saved by the jettison, no contribution takes place, and the goods saved are not held to contribute for those lost or damaged thereby.

2562. If the ship be saved by the jettison and continues her voyage, but be afterwards lost, the goods saved are subject to contribution at their actual value, deducting the costs of salvage.

2563. The goods jettisoned do not in any case contribute to the payment of losses happening afterwards to the goods saved. The cargo does not contribute to the payment of the ship when lost or rendered unfit for navigation.

2564. In case of the loss of goods put into lighters to enable the ship to enter into a port or river, the ship and her whole cargo are subject to contribution, but if the ship be lost with the goods remaining on board, the goods in the lighters are not subject to contribution, although they arrive safely in port.

2565. It is the duty of the master on his arrival at the first port to make his declaration and protests in the customary form, and also together with some of his crew to make oath that the loss or expense sustained was for the safety of the ship and crew. The neglect to do so does not, however, affect the rights of the parties interested.

2566. The owners and master have a privilege and right of retention upon the

¹ *Supra* p. 726. ² *Ib.* p. 725.

goods on board the ship or their price for the amount of contribution for which these are liable.

2567. If after the contribution the goods jettisoned be recovered by the owner, he is bound to repay to the master and other interested parties, the amount of the contribution received by him, deducting therefrom the amount of damage suffered by the goods and the costs of salvage.

CHAPTER THIRD.

Of Fire Insurance.

2568. Insurance against loss by fire is regulated by the provisions contained in the first chapter of this title, and is subject also to the rules contained in the second chapter, when these can be made to apply and are not inconsistent with the articles contained in this chapter.

2569. A fire policy contains the name of the party in whose favour it is made ;

A description or sufficient designation of the object of the insurance and of the nature of the interest of the insured ; A declaration of the amount covered by the insurance, of the amount or rate of the premium, and of the nature, commencement and duration of the risk ;

The subscription of the insurer with its date ;

Such other announcements and conditions as the parties may lawfully agree upon.

2570. Representations not contained in the policy or made a part of it, are not admitted to control its construction or effect.

2571. The interest of an insurer against loss by fire may be that of an owner, or of a creditor, or any other interest appreciable in money in the thing insured ; but the nature of the interest must be specified.

2572. It is an implied warranty on the part of the insured that his description of the object of the insurance shall be such as to shew truly under what class of risks it falls according to the proposals and conditions of the policy.

2573. An insurance upon effects indeterminately as being in a certain place is not limited to the particular effects which are there at the time of insuring, but attaches to all those falling within the description contained in the policy which are in the place at the time of the loss ; unless a different intention is indicated in the policy.

2574. Any alteration in the use or condition of the thing insured from those to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured and which increases the risk, is a cause of nullity of the policy.

If the alteration do not increase the risk, the policy is not affected by it.

2575. The sum insured does not constitute any proof of the value of the object of the insurance ; such value must be established in the manner required by the conditions of the policy and the general rules of proof, unless there is a special valuation in the policy.

2576. The insurance is rendered void by the transfer of interest in the object of it from the insured to a third person, unless such transfer is with the consent or privity of the insurer.

The insured has in all cases a right to assign the policy with the thing insured, subject to the conditions therein contained (as amended by article 6271, R. S. Q., 1888).

2577. A transfer of interest by one to another of several partners or owners of undivided property who are jointly insured, does not avoid the policy.

2578. The insurer is liable for losses caused by the insured otherwise than by fraud or gross negligence.

2579. The insurer is also liable for losses caused by the fault of the servants of the insured committed without his knowledge or consent.

2580. The insurer is liable for all losses which are the immediate consequence of

fire or burning from whatever cause it may arise, including damage to the things insured suffered in their removal or by the means used for extinguishing the fire; subject to the special exceptions contained in the policy.

2581. The insurer is not liable for losses caused merely by excessive heat in a furnace, stove or other usual means of communicating warmth when there is no actual burning or ignition of the thing insured.

2582. In case of loss by fire the insurer is liable for the whole amount of the loss not exceeding the sum insured, without deduction or average.

2583. When by the terms of the policy a delay is given for the payment of the renewed premium, the insurance continues, and if a loss occur within the delay, the insurer is liable, deducting the amount of the premium due.

2584. The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused.

CHAPTER FOURTH.

Of Life Insurance.

2585. Life insurance is regulated by the provisions contained in the first chapter of this title, and is subject also to the rules contained in the second chapter when these can be made to apply and are not inconsistent with the articles contained in this chapter.

Articles 2570¹ and 2583 apply to contracts of life insurance.

2586. Life insurance is subject also to the rules contained in articles 1902, 1903, 1904, 1905, 1906, relating to the persons upon whose life it may be effected.

The articles above referred to are as follows :—

1902. The rent may be upon the life of the person who constitutes it, or who receives it, or upon the life of a third person who has no right to the enjoyment of it.

1903. It may be constituted upon one life or upon several lives. But if it be for more than ninety-nine years or three successive lives, and affect real estate, it becomes extinct thereafter as provided in article 390.

[Article 390 is as follows :—

It is nevertheless competent for the parties to stipulate, in the title creating these rents, that they shall only be redeemed at a certain time agreed upon, which cannot exceed thirty years; every stipulation extending this term being null with regard to the excess.]

1904. It may be constituted for the benefit of a person other than the one who gives the consideration.

1905. A life-rent constituted upon the life of a person who is dead at the time of the contract produces no effect, and the consideration paid for it may be recovered back.

1906. [The rule declared in the last preceding article applies equally when the person upon whose life the rent is constituted is, without the knowledge of the parties, dangerously ill of a malady of which he dies within twenty days after the date of the contract.]

2587. A life policy contains :—The name or sufficient designation of the party in whose favour it is made, and of the person whose life is insured ;

A declaration of the amount of the insurance, of the amount or rate of premium, and of the commencement and duration of the risk ;

The subscription of the insurer, with its date ;

Such other announcements and conditions as the parties may lawfully agree upon.

2588. The declaration in the policy of the age and condition of health of the person upon whose life the insurance is made, constitutes a warranty upon the correctness of which the contract depends.

Nevertheless in the absence of fraud the warranty that the person is in good

¹ *Supra* p. 729.

health is to be construed liberally and not as meaning that he is free from all infirmity or disorder.

2589. In life insurance the sum insured may be made payable upon the death of the person upon whose life it is effected, or upon his surviving a specified period, or periodically so long as he shall live, or otherwise contingent upon the continuance or determination of life.

2590. The insured must have an insurable interest in the life upon which the insurance is effected.

He has an insurable interest in the life :

1. Of himself ;
2. Of any person upon whom he depends wholly or in part for support or education ;
3. Of any person under legal obligation to him for the payment of money, or respecting property or services which death or illness might defeat or prevent the performance of ;
4. Of any person upon whose life any estate or interest vested in the insured depends.

2591. A policy of insurance on life or health may pass by transfer, will, or succession, to any person, whether he has an insurable interest or not in the life of the person insured.

2592. The measure of the interest insured is the sum fixed in the policy, except in cases of insurance by creditors or in other like cases in which the interest is susceptible of exact pecuniary measurement.

In these cases the sum fixed is reduced to the actual interest.

2593. Insurance effected by a person on his own life is void if he die by the hands of justice, by duelling, or by suicide.

2598. If the time of the risk do not appear from the contract, it runs, with respect to the ship and freight, from the day she sails until she is anchored or moored in the place of her destination. With respect to the cargo, it runs from the time the goods are shipped until their delivery ashore.¹

REVISED STATUTES OF QUEBEC, 1888.

TITLE IV.—PART II.

SECTION XVII.

Taxes Upon Commercial Corporations.

1143. In order to provide for the exigencies of the public service, every one of the following companies and corporations doing business in the province, namely : * * * *

Every insurance company accepting risks and transacting the business of insurance therein, * * * *

Shall, annually, pay the several taxes mentioned and specified in article 1145, which taxes are hereby imposed upon each of such commercial corporations, respectively.

1144. In this section the following words and expressions have the meaning and application indicated in this article : * * * *

"Insurance company" comprises life, fire, ocean, inland marine, guarantee and accident insurance companies, but does not include mutual insurance companies organized under the laws of this province : * * * *

"Head Office" means the most important office or place of business, in the Province of Quebec, of any commercial corporation.

1145. The annual taxes imposed upon and payable by the commercial corporations mentioned and specified in article 1143 shall be as follows : * * * *

¹ *Supra* p. 723.

II.—Insurance Companies.

(a) An insurance company carrying on the business of one kind of insurance only, five hundred dollars ;

(b) An insurance company carrying on the business of two or more kinds of insurance at the same time, five hundred dollars for the first kind of insurance, and an additional sum of fifty dollars for each kind of insurance beyond one ;

(c) Companies known as plate-glass insurance companies shall each pay a tax of one-tenth of 1 per cent. upon the amount of their paid-up capital ;

(d) An additional tax of \$100 for each office or place of business in the cities of Montreal and Quebec, and of five dollars for each office or place of business established in any other place ;

(e) Every person acting as a broker for marine insurance companies, which do not carry on the business of insurance in the province and have no office or place of business therein, shall pay a principal tax of two hundred dollars and an additional tax of fifty dollars for each of his offices or places of business.

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1146. Such taxes shall be payable on the first juridical day of the month of July in each year.

1147. The total amount of the taxes imposed upon any commercial corporation coming under this section shall be payable annually to the collector of provincial revenue of the revenue district in which the commercial corporation has its head office.

1148. On or before the first day of May in each year, every commercial corporation doing business in the province shall, without awaiting any notice or demand to that effect from the Government, forward in duplicate to the Provincial Treasurer a detailed statement in which shall be set forth, in so far as required, in view of the collection of such taxes, by that part of article 1145 referring to each class of commercial corporations, the name of the corporation, its nature, the amount of its capital paid up, the number and situation of each and all of its offices places of business, agencies.

* * * * *

At the same date in each year, every person acting as a broker for one or more marine insurance companies, which do not carry on the business of insurance in this province and have no office or place of business therein, shall make a report of the number and the situation of his offices or places of business, as well as the name and nature of each company for which he transacts the business of insurance.

* * * * *

1149. Every commercial corporation carrying on business in the Province of Quebec, and every broker acting for the marine insurance companies described in the preceding article, who neglects to conform to the provisions of such article, shall *ipso facto* be liable to a fine of ten dollars per day for each day during which such negligence continues, counting from the day such taxes become due until the statements required by the said preceding article are forwarded to the Provincial Treasurer. Every such commercial company and every such broker who shall make an incomplete or incorrect statement, shall be deemed not to have made a report.

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1151. Every annual tax imposed by this section, which is not paid, may be recovered with legal interest thereon from the date upon which such tax became due, by an action brought in his own name, on behalf of Her Majesty, by the collector of provincial revenue of the district in which such tax was payable.

The fine imposed by articles 1149 and * * * shall be recoverable in the same manner.

2. All actions for the recovery of such taxes shall be brought in the judicial district in which they are payable, either before the Circuit Court or the Superior

Court, according to the competence of the court with reference to the amount claimed.

3. Costs shall not be adjudged against the collector of provincial revenue in any action instituted by him under this section; but, on the recommendation of the court, the Provincial Treasurer may, in his discretion, pay to the commercial corporation, in favour of which judgment has been rendered, the costs to which he may deem it equitably entitled.

REVISED STATUTES OF QUEBEC, 1888.

By 58 Victoria, Chapter 34, "An Act respecting Benevolent and Mutual Benefit Associations and Mutual Insurance Companies," assented to 21st December, 1895, the following section and articles are added after article 5375 of the Revised Statutes:—

TITLE XI., CHAPTER III., SECTION XVIIIa.

BENEVOLENT AND MUTUAL BENEFIT ASSOCIATIONS AND MUTUAL INSURANCE COMPANIES.¹

5375a. No foreign mutual benefit and aid association or mutual insurance company, which is not already, under the laws of Canada, obliged to make a deposit with the Federal Government, or which does not come under articles 5264 to 5375, inclusively, of these Revised Statutes, is allowed to carry on any business in the province, unless it has obtained an authorization from the Lieutenant Governor in Council.

5375b. Such authorization is given upon petition, if the association or company:

1. Publishes a notice of such application in the *Quebec Official Gazette* during one month, and in a newspaper published in French and in one published in English in the locality in which the chief office is to be established;

2. Deposits in the office of the Provincial Secretary a copy of its charter, articles of association or other deed constituting the same as a corporation, certified by the officer having the custody of the original;

3. Establishes that it is so constituted as to carry out the obligations which it may contract;

4. Deposits in the office of the Provincial Secretary a power of attorney constituting a chief agent in the province for the purpose of receiving services in any suit or proceeding against it, and declaring where the principal office of the association or company is to be established.

5375c. The Lieutenant-Governor in Council may, according to circumstances, before granting the authorization, require the association or company to deposit, with the Provincial Treasurer, such sum of money as he may deem necessary to guarantee the carrying out of the engagements entered into in this province; which sum may be increased or diminished, from time to time, by the Lieutenant-Governor in Council, as circumstances may require.

Such deposit shall bear interest at the rate of three per cent. per annum in favour of the association or company.

5375d. Notice of the granting of such authorization shall be published by the Provincial Secretary in the *Quebec Official Gazette*, according to the form of the schedule A; and from the date of such publication and of the deposit in the office of the prothonotary of the Superior Court of the district in which the principal office of the association or company is to be situated, of a copy of the *Quebec Official Gazette* containing such notice, such association or company may commence business.

¹The Revised Statutes of Quebec (1883), art. 5624 *et seq.*, contain further provisions regulating the formation of mutual fire, etc., insurance companies and their inspection, etc.

On receipt of such copy of the *Quebec Official Gazette*, the prothonotary shall transcribe the notice in a register kept for that purpose.

5375e. Whenever any such association or company changes its chief agent or the location of its chief office, it shall forward to the Provincial Secretary a copy of the new power of attorney concerning the same, and notice thereof must be given in the *Quebec Official Gazette*.

A copy of such Gazette must be deposited and the notice be transcribed in the manner prescribed by the preceding article.

5375f. Any person doing business for any association or company falling within the provisions of article 5375a, which has not complied with the formalities required before it could commence business in the province, or which has not complied with the provisions of article 5375e, is liable to a fine not exceeding one hundred dollars for each offence, and in default of payment, imprisonment not exceeding three months.

5375g. Prosecution under this section shall be governed by the provisions of Part LVIII. of the Criminal Code, 1892.

SCHEDULE A.

FORM MENTIONED IN ARTICLE 5375d.

The (name) association or company has been duly authorized to carry on business in the province of Quebec.

Its principal place of business in the province is in (name of the city, town, &c.)

Its principal agent for the purpose of receiving services in actions or proceedings against it is (name and residence of the agent.)

(Date)

Provincial Secretary.

TITLE XI.—CHAPTER III.—SECTION XIX.

Payment of Dividends by Certain Insurance Companies.

5376. If the managers, directors or trustees of any fire, life, marine or other insurance company, incorporated by the Legislature of Canada, or of this province, knowingly and wilfully declare and pay any dividend or bonus out of the paid-up capital of the company, when the company is insolvent, or which would render it insolvent, or which would diminish the amount of its capital stock, such managers, directors or trustees, who are present when such dividend or bonus is declared and which is afterwards paid, shall be jointly and severally liable for all the debts of the company then existing, and for all thereafter contracted while such managers, directors or trustees respectively remain in office; but if any of them object to the declaration of such dividend or bonus, or to the payment of the same, and at any time before the time fixed for the payment thereof, file a written statement of such objection in the office of the company, and also in the registry office of the division or county where the company is situate, such managers, directors or trustees shall be exempt from such liability. C.S.C., c. 69, s. 1.

By 58 Victoria, Chapter 35 above referred to, the following section and articles as amended by 60 Victoria, Chapter 45, are added after 5376 of the said Revised Statutes:

SECTION XIXa.

PAYMENTS OF AID OR ASSISTANCE BY MUTUAL AID AND BENEFIT ASSOCIATIONS.

5376a. In mutual aid and benefit associations constituted under articles 3006 to 3104, or under a special charter, or carrying on business under the authorization of the Lieutenant-Governor in Council, as provided by article 5375a, the aid or assistance paid to sick members cannot exceed the amount to be raised for that purpose, after deducting the costs of management chargeable to that service.

5376b. The members of the committee of management or board of directors of the association are jointly and severally responsible for any payment made in contravention of the preceding article, and may be condemned to reimburse to the association any sum so paid upon suit brought by any member of such association

* * * * *

5. This Act and the laws thereby amended apply as well to associations and companies now doing business as to those that may be hereafter formed.

(2.) Associations and companies falling under the provisions of article 5375a are granted a delay of two years, from the coming into force of this Act, to comply with the provisions of this Act.

6. This Act shall come into force on the day of its sanction.

ONTARIO ENACTMENTS.

60 VIC., c. 36.

AN ACT TO CONSOLIDATE AND AMEND THE ACTS RESPECTING INSURANCE.

SHORT TITLE, s. 1.

INTERPRETATION, s. 2.

INCORPORATION :

(1) Of Joint Stock Insurance Companies, ss. 3-7.

(2) Of Mutual and Cash Mutual Fire Insurance Companies, ss. 8-19.
Share or Stock Capital in Mutual or Cash Mutual Fire Insurance Companies, Conversion of such companies into Joint Stock Companies, ss. 20-29.

(3) Of Friendly Societies, ss. 30-39.

CHANGE OF NAME OR HEAD OFFICE IN PROVINCIAL INSURANCE CORPORATIONS, s. 40.

GOVERNMENT DEPOSITS, ss. 41-52.

LICENSING OF INSURANCE COMPANIES, s. 53.

REGISTRATION OF INSURANCE CORPORATIONS, ss. 54-56.

INSURANCE COMPANY REGISTER :

What Corporations registered thereon, ss. 57-9.

FRIENDLY SOCIETY REGISTER :

What Corporations registered thereon, ss. 60-3.

PROCEEDINGS TO REGISTRY ; DURATION OF REGISTRY, ss. 64-73.

EVIDENCE OF REGISTRY AND OF OTHER MATTERS ; NOTICES UNDER THE ACT, ss. 74-75.

SUSPENSION OR CANCELLATION OF REGISTRY ; APPEALS, ss. 76-84.

UNREGISTERED CORPORATIONS DISQUALIFIED ; ASSESSMENT INSURANCE, PENALTIES, ss. 85-86.

BOOKS OF REGISTERED CORPORATIONS :

Periodical Audit. Investments. Financial Statements, ss. 87-97.

POWERS OF DIRECTORS. (All Provincial Insurance Cos.), ss. 98-195.

MUTUAL AND CASH MUTUAL FIRE INSURANCE COMPANIES :

Their internal management, ss. 106-141 : 1. Admission and withdrawal of Members, ss. 107-111 ; 2. General Meetings, ss. 112-116 ; 3. Directors, qualifications, election, etc., ss. 117-126 ; 4. Premium notes and assessments, ss. 127-141.

GENERAL PROVISIONS RELATING TO CONTRACTS OF INSURANCE, ss. 142-146.

INSURANCE OF THE PERSON : 1. GENERAL PROVISIONS APPLICABLE TO ALL INSURERS, ss. 147-161. 2. ADDITIONAL PROVISIONS APPLICABLE TO FRIENDLY SOCIETIES ONLY, ss. 162-165.

FIRE INSURANCE : GENERAL PROVISIONS, ss. 166-7. 2. STATUTORY CONDITIONS AND PROVISIONS RELATING THERETO, ss. 168-173.

INVESTIGATION OF FIRES, ss. 174-5.

INSPECTION OF INSURANCE COMPANIES LICENSED BY THE PROVINCE, ss. 176-183.

VOLUNTARY LIQUIDATION OF PROVINCIAL INSURANCE COMPANIES, s. 184.

VOLUNTARY LIQUIDATION OF FRIENDLY SOCIETIES OR FUNDS ; AMALGAMATION OF BRANCHES OR LODGES, s. 135.

COMPULSORY LIQUIDATION OF PROVINCIAL INSURANCE CORPORATIONS, ss. 186-195.

COSTS ; PRIORITIES, s. 196.

FEES PAYABLE UNDER THE ACT, s. 197.

REPEALING CLAUSE, s. 198.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

1. This Act may be cited as *The Ontario Insurance Act, 1897*. R. S. O. 1887, c. 107, s. 1.

2. Where the following words and expressions respectively occur in this Act, or in the schedules hereto, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears :—

(1) "Province" and "Legislature" mean respectively the Province and Legislature of Ontario. R. S. O. 1887, c. 167, s. 2 (1), 55 V. c. 39, s. 2.

(2) "Foreign Jurisdiction" includes any jurisdiction other than that of Ontario.

(3) "This Act" includes any Act amending or consolidating this present Act, or incorporated therewith.

(4) "The Minister" means the member of the Executive Council under whose direction this Act is administered. R. S. O. 1887, c. 167, s. 2 (2).

(5) "Inspector" means the Inspector of Insurance for the Province. 55 V. c. 29, s. 2 (2); R. S. O. 1887, c. 167, s. 2 (3).

(6) "Registry" as applied to insurance corporations or organizations means registration on the Insurance Company Register, or on the Friendly Society Register, according as the matter pertains to an insurance company or a friendly society respectively; and "Registry" includes extension or renewal of registry. 55 V. c. 39, s. 2 (3); 58 V. c. 34, s. 2 (2).

(7) "Registry Officer" or "Registrar" or "Insurance Registrar" means the Inspector of Insurance or the Registrar of Friendly Societies according as the matter pertains to an insurance company or to a friendly society respectively.

(8) "Registered" corporation or person means a corporation or person duly registered or deemed to be so registered under this Act; and "unregistered" corporation or person includes any corporation or person not so registered or not deemed to be so registered for the kind or character of insurance transacted or undertaken, or offered to be undertaken or transacted, whether such corporation or person was never duly registered for that purpose, or, having been so registered, lost such registry through non-renewal, suspension, revocation or cancellation. 55 V. c. 39, s. 2 (6).

(9) "Municipality" has the same meaning as in *The Municipal Act*. R. S. O. 1887, c. 167, s. 2 (10).

(10) "Company" means and includes any corporation, or any society or association, incorporated or unincorporated, or any partnership, or any underwriter that undertakes or effects for valuable consideration, or agrees or offers so to undertake or effect, in the Province, any contract of insurance within the intent of this Act. R. S. O. 1887, c. 167, s. 2 (4).

(11) "Provincial" company or "Provincial" corporation means a company or body incorporated by the Province and operated under the Act or instrument by virtue of which the company or body became so incorporated. Cf. R. S. O. 1887, c. 167, s. 2, (8).

(12) "Canadian" company or "Canadian" corporation means a company or body incorporated by the Dominion of Canada and operated under the Act or instrument by virtue of which the company or body became so incorporated. Cf. R. S. O. 1887, c. 167, s. 2 (9).

(13) "Society" or "Friendly Society" includes any corporation, society, association, or fraternity, benevolent, mutual, provident, industrial, or co-operative, or the like, which (not being a corporation within the intent of sections 57 to 59 of this Act or required by law to be licensed for the transaction of insurance) undertakes or effects for valuable consideration, or agrees or offers so to undertake, or effect, with any person in the Province, any contract of insurance.

(a) Provided that where the corporation is not organized exclusively for purposes of such contracts, then "society" means only that branch, or department, or division of the corporation which has such contracts in charge; and for purposes of such contracts there shall be kept distinct and separate funds, books, accounts and vouchers. 55 V. c. 39, s. 2 (4a).

(b) Provided also, that where two or more lodges or branches (by whatever name known) of a society, though separately incorporated, are under the financial or administrative control of a central governing body within the Province, or a duly authorized Provincial representative of the society, then such governing body, if incorporated, or such Provincial representative of the society may, in the discretion of the Registrar, be dealt with as the society for any or all purposes of this Act. 55 V. c. 39, s. 2 (4b).

(c) Provided also, that, in the case of a friendly society incorporated elsewhere than in Ontario, the central governing or controlling body within the Province, if incorporated by virtue of the law of the Province, may, in the discretion of the Registrar, be dealt with as the society for any or all purposes of this Act. 55 V. c. 39, s. 2 (4c).

(14) The word "Lodge" includes a primary subordinate division (by whatever name known) of a friendly society. 56 V. c. 32, s. 1 (5).

(15) "Branch" means any number of the members of a corporation under the control of a central body, having (within the intent of subsection 30 of this section) a separate insurance fund administered by themselves, or by a committee of officers appointed by themselves:

Provided that, in the corporations mentioned in subsections 2 and 4 of section 60, "branch" shall include the committee or persons having, under the authority of the respective Acts of Canada, the management of the benefit and insurance funds, or gratuity funds respectively. 55 V. c. 39, s. 2 (5).

(16) The expression "trade or labor union or trade or labor organization" means such an organization of wage earners of a particular trade or industrial calling as is primarily constituted and is actually operated *bona fide* for the regulation of the wages and hours of labor as between employers and employed; but shall not be deemed to include co-operative associations or societies within the meaning of chapter 166 of the Revised Statutes of Ontario, 1887. 56 V. c. 32, s. 1 (2); 58 V. c. 34, s. 1 (8).

(17) "Collector" includes every officer, agent or person receiving pay, however remunerated, who by himself or by any deputy or substitute collects premiums, fees, assessments or other moneys for an insurance corporation. 55 V. c. 39, s. 2 (17).

(18) "Directors" include the board or committee (by whatever name known) having the management of the insurance corporation.

"Officer" extends to any trustee, director, manager, treasurer, secretary or member of the board or committee of management of a corporation, or to any person appointed by the corporation to sue and be sued in its behalf. 55 V. c. 39, s. 2 (19).

(19) "Rules" means and includes provisions of the constitution and rules or regulations, or resolutions or by-laws in force for the time being. 55 V. c. 39, s. 2 (19).

(20) "Head office" means the place where the chief executive officers of an insurance corporation transact its business. 55 V. c. 39, s. 2 (20).

(21) "Chief Agency" means the principal office or place of business in Ontario of an extra-provincial corporation undertaking insurance in Ontario. 65 Vic. 3. 39, s. 2 (21).

(22) As applied to any instrument, "written" means and includes an instrument written or printed, or partly written and partly printed; and "sealed" means an instrument under corporate or other seal. R. S. O. 1887, c. 167, s. 2 (7); 55 V. c. 39, s. 2 (9).

(23) "Contract" means and includes any contract or agreement sealed, written or oral, the subject matter of which is within the intent of sub-section 35 of this section. R. S. O. 1887, c. 167, s. 2 (6); 55 V. c. 39, s. 2 (8).

(24) "Policy" includes any contract of insurance within the meaning of this Act. 58 V. c. 34, s. 1 (5).

(25) The expression "offer to undertake contracts" shall, both as to the corpora-

tion and the person acting or purporting to act in its behalf, include any setting up of a sign or inscription containing the name of the corporation, or any distribution or publication of any proposal, circular, card, advertisement, printed form, or like document in the name of the corporation, or any written or oral solicitation in the corporation's behalf, or any collecting or taking premiums of insurance. R. S. O. 1887, c. 167, s. 2 (5); 55 V. c. 39, s. 2 (4); 58 V. c. 34, s. 2 (1).

(26) "Maturity" of an insurance contract means the happening of an event, or the expiration of the term at which the benefit under the contract accrues due. 53 V. c. 39, s. 1 (2); 55 V. c. 39, s. 2 (15).

(27) "Premium" includes any valuable consideration given or promised for insurance. 55 V. c. 39, s. 2 (7).

(28) "Premium note" means an instrument given as consideration for fire or live-stock insurance, whereby the maker undertakes to pay such sum or sums as may be legally demanded by the insurer, the aggregate of such sums not to exceed an amount specified in the instrument.

(29) "Insurance corporation," or "corporation" simply, includes any corporation which undertakes, or offers to undertake a contract of insurance within the meaning of sub-section 35, and also includes any continuously existent body which undertakes or offers to undertake such contract, and which, though not actually incorporated, is nevertheless legally entitled to sue and be sued in the name of any officer thereof, or of a public officer. 55 V. c. 39, s. 2 (13). 58 V. c. 34, s. 2 (3).

(30) "Insurance fund" or "insurance funds" as applied to any friendly society within the meaning of sub-section 13 of this section, or as applied to any corporation not incorporated exclusively for the transaction of insurance, includes all moneys, securities for money, and assets appropriated by the constitution, by-laws or rules of the society to the payment of insurance liabilities or appropriated for the management of the insurance branch or department or division of the society, or otherwise legally available for insurance liabilities. 55 V. c. 39, s. 2 (13).

The expression "insurance fund" or "insurance funds" shall not be deemed to include any fund or funds of a trade or labor union or organization appropriated to or applicable for the voluntary assistance of wage earners, unemployed or upon strike. 56 V. c. 32, s. 1 (3).

(31) "The insurer" means the corporation undertaking the contract of insurance or of reinsurance, as the case may be. 55 V. c. 39, s. 2 (13).

(32) "The assured" means the person whose property, life, safety, health, fidelity or insurable interest is insured. 55 V. c. 39, s. 2 (13).

(33) "Nominee" when used with reference to annuities on lives means a designated person on whose life another's annuity depends.

(34) "Maximum" means the largest sum which, under the contract, the benefit may reach, but may not in any event exceed. 50 V. c. 39, s. 2 (11).

(35) "Insurance" includes the following, whether the contract be one of primary insurance, or of reinsurance, and whether the premium payable be a sum certain, or consist of sums uncertain or variable in time, number or amount. 55 V. c. 39, s. 2 (12).

(a) Insurance against death, sickness, infirmity, casualty, accident, disability, or any change of physical or mental condition. 55 V. c. 39, s. 2 (12a)

(b) Insurance against financial loss; or against loss of work, employment, practice, custom, wages, rents, profits, income or revenue. 55 V. c. 39, s. 2 (12b).

(c) Insurance of property against any loss or injury from any cause whatsoever, whether the obligation of the insurer is to indemnify by a money payment, or by restoring or reinstating the property insured. 55 V. c. 39, s. 2 (12c).

(d) Contracts of endowment, assessment-endowment, tontine, semi-tontine, lifetime benefits, annuities on lives, or contracts of investment involving tontine or survivorship principles for the benefit of persisting members; or any contract of investment involving life contingencies. 55 V. c. 39, s. 2 (12d).

- (e) Any contract made on consideration of a premium and based on the expectancy of life; or any contract made on such consideration and having for its subject the life, safety, health, fidelity or insurable interest of any person, whether the benefit under the contract is primarily payable to the assured or to a donee, grantee or assignee, or to trustees, guardians, or representatives, or to (or in trust for) any beneficiary, or to the assured by way of indemnity or insurance against any liability incurred by him by or through the death or injury of any person. 55 V. c. 39, s. 2 (12e).
- (f) Any investment contract under which lapses or payments made by discontinuing members or investors accrue to the benefit of persisting members or investors, except where a corporation (other than an insurance corporation) is expressly authorized to undertake such contract by a statute in force in Ontario. 55 V. c. 39, s. 2 (12f).
- (g) Generally any contract in the nature of any of the foregoing whereby the benefit under the contract accrues payable on and after the occurrence of some contingent event. 55 V. c. 39, s. 2 (12g).

(36) "Insurance of the person" includes insurance against death, sickness, infirmity, casualty, accident, disability, or against any change of physical or mental condition; or any contract of insurance having for its subject the life, health, safety or physical or mental condition of a person. 55 V. c. 39, s. 35 (1).

(37) "Endowment insurance" includes any contract of insurance which contains an undertaking to pay an ascertained or ascertainable sum at a fixed future date, provided the assured is then alive. An undertaking to pay such sum on the assured reaching his expectancy or expectation of life shall be deemed to be endowment insurance. 56 V. c. 32, s. 1 (4).

(37a) "Assessment insurance" or "insurance on the assessment system" includes any contract in which the premium, not being a premium note within the meaning of subsection 28 of this section, consists of sums uncertain or variable in time, number or amount; and also any contract whereby the benefit is in any manner or degree made dependent upon the collection of sums levied upon persons holding similar contracts, or upon members of the contracting corporation:

Provided, that any assessment insurance undertaken or transacted under the authority of the *Insurance Act of Canada* shall be deemed assessment insurance for purposes of this Act. 55 V. c. 39, s. 2 (14).

(38) "Benefit" includes all benefit, bonus and insurance moneys payable by the insurer under the contract; and "beneficiary" includes every person entitled to such moneys, and the executors, administrators and assigns of any person so entitled. 55 V. c. 39, s. 2 (10).

(39) In insurance of the person the husband, wife, children, grandchildren and mother of the assured shall constitute a class which may be known as "preferred beneficiaries," and all other beneficiaries may be known as "ordinary beneficiaries."

(40) In such insurance the phrase "legal heirs" or "lawful heirs" shall mean and include all the lawful surviving children of the assured, and also the wife or husband if surviving the assured; or where the assured died without lawful surviving children and unmarried, it shall mean those persons entitled to take according to the Statute of Distributions.

(41) "Beneficiary for value" means a beneficiary for a valuable consideration other than marriage.

(42) "Mutual insurance" means, in the case of fire or live stock insurance, insurance given in consideration of a premium note or undertaking with or without an immediate cash payment thereon; and "mutual company" means a company empowered solely to transact such insurance. R. S. O. 1887, c. 167, s. 2 (11).

(43) "Insurance on the cash plan" means insurance given for a money consideration without premium note.

(44) "Cash-mutual company" means a company organized to transact mutual insurance, but empowered to undertake contracts of insurance on both the cash plan and the premium note or mutual plan. R. S. O. 1887, c. 167, s. 2 (12).

(45) "Member" as applied to any mutual or cash-mutual company transacting fire or live stock insurance means a policy-holder on the premium note plan, but as to those mutual or cash-mutual companies which in terms of this Act have joint stock capital, "member" includes, where the context so requires, any holder of one or more shares of such capital. R. S. O. 1887, c. 167, s. 2 (14).

(46) "Inland marine insurance" means marine insurance in respect of subjects of insurance at risk above the harbour of Montreal. R. S. O. 1887, c. 167, s. 2 (13).

(47) "Guarantee insurance" includes contracts where a corporation, firm or person, not being the grantor, undertakes to insure the validity of title, or not being the debtor undertakes to insure the payment of money due or to become due.

(48) "Actuarial liabilities" means the liabilities chargeable against an insurance corporation in respect of its insurance contracts prior to their maturity. 55 V. c. 39, s. 2 (16).

"Actuarial solvency" means the solvency of an insurance corporation when its actuarial liabilities are charged or treated as present liabilities. 55 V. c. 39, s. 2 (16).

"Solvent," as applied to a friendly society not undertaking endowment insurance or annuities, means a society respecting which it has been made to appear to the Insurance Registrar that the society has no present liabilities apart from actuarial liabilities, or has immediately realizable assets adequate to discharge its present actual liabilities. 55 V. c. 39, s. 2 (16); 56 V. c. 32, s. 10 (2).

(49) "Account" includes travelling expenses or bills of costs. 58 V. c. 34, s. 1 (6).

(50) "Receiver" includes interim receiver. 58 V. c. 34, s. 1 (7).

(51) "Contributory" includes any person who (either in his own right or as liable for or representing another) is bound to contribute to the assets of a corporation for the payment of its debts. Cf. 58 V. c. 34, s. 1 (2).

(52) "Estate" includes estate and effects. 58 V. c. 34, s. 1 (3).

(53) "Creditor" includes every person entitled to claim under a matured policy or under a policy having a fixed surrender value; and, in the case of a corporation required by law or departmental regulation to maintain an ascertained or ascertainable reserve to meet its actuarial liabilities under unmatured policies, "creditor" also includes any person holding or entitled to claim under such an unmatured policy. 58 V. c. 34, s. 1 (4).

(54) "Due application" includes such information, evidence and material as the Registrar shall require to be furnished; and also the prepayment to the Provincial Treasurer of the fees hereinafter prescribed in respect of any application, certificate or document required or issued by virtue of this Act. 55 V. c. 39, s. 2 (22).

(55) "Upon proof" as applied to any matter connected with the registry of a corporation or person, or with the registration of any matter or thing required by this Act to be registered, means upon proof to the satisfaction of the Registrar. 55 V. c. 39, s. 2 (23).

(56) "Appeal" includes every judicial revision or review of a judgment, decision, order, direction, determination, finding or conviction, and also includes every case stated or reserved, and every removal of proceedings by way of certiorari or otherwise. 58 V. c. 34, s. 2 (4).

INCORPORATION OF JOINT STOCK COMPANIES.

3.—(1) The Lieutenant-Governor in Council may, on the written recommendation of the Inspector, approved by the Minister, grant by letters patent under the Great Seal, a charter to any number of persons, not less than five, constituting such persons and others (being shareholders in the joint stock company thereby created) a body corporate and politic for the purpose of undertaking and transacting any kind of insurance for which a joint stock company may be licensed under this Act. R. S. O. 1887, c. 167, s. 4 (1).

(2) Applicants for incorporation under this section shall immediately prior to the actual application, publish in at least four consecutive issues of the *Ontario Gazette*, notice of their intention to apply, and shall if so required publish also elsewhere notice of such intention. R. S. O. 1887, c. 157, s. 6.

(3) The notice required by the next preceding sub-section shall set out the full names and additions of the applicants, and their residences and occupations; shall state the proposed corporate name of the company, the kind of insurance proposed to be transacted, the place where the head office of the company is to be, the amount of capital stock, the number of shares into which the capital is to be divided, and the amount of each share. R. S. O., 1887, c. 157, s. 6.

(4) The applicants shall deliver to the Inspector the application for incorporation, together with proof that public notice has been duly given thereof; shall also deliver copies of the proposed by-laws of the corporation and such other material as under this Act is required of a company applying for license, including the Provincial Treasurer's receipts for all necessary fees, and thereupon the Inspector shall make his report to the Minister. R. S. O. 1887, c. 167, ss. 4, 6.

4.—All letters patent issued to applicants for incorporation under section 3 shall be expressed to take effect on and from the day of the date of the initial license issued to the applicant company under this Act; also the incorporation shall be expressed in the letters patent to be for the transaction of such kind or kinds of insurance as shall be authorized by the Provincial license from time to time issued to the said company. O. C., 31st July, 1889.

5.—(1) The affairs of every company incorporated under section 3 shall be managed by a board of not less than five nor more than fifteen directors. R. S. O. 1887, c. 167, s. 5 (1); 55 V., c. 39, s. 63 (1).

(2) The first five of the persons named in the charter of incorporation shall be directors of the company until replaced by others duly elected or appointed or named in their stead. R. S. O. 1887, c. 167, s. 5 (2).

(3) The after directors of the company shall be elected by the shareholders in general meeting of the company assembled, at such times, in such wise, and for such term, not exceeding two years, as the by-laws of the company may prescribe. R. S. O. 1887, c. 167, s. 5 (3).

6.—(1) The capital stock of the company incorporated under section 4 shall be as follows :—

If the company undertakes fire, or fire and inland marine, or accident, or life, or life and accident, or guarantee, or suretyship insurance, the capital stock shall be not less than \$500,000, with liberty to increase the same to \$1,000,000 with the assent of the Lieutenant-Governor in Council; and before applying for license the company shall furnish to the Inspector satisfactory evidence that of the said capital stock at least \$300,000 has been subscribed for and taken up *bona fide*, and that \$30,000 of the said subscribed stock has been paid into some chartered bank of Canada. R. S. O. 1887, c. 167, s. 6 (1).

(2) If the company undertakes livestock insurance, with or without insurance on vehicles, the capital stock shall be at least \$300,000, with liberty to increase the same as in the first sub-section to \$500,000, of which, as in said sub-section \$150,000 shall be shown to have been subscribed, and \$15,000 to have been paid into some chartered bank of Canada. R. S. O. 1887, c. 167, s. 6 (2).

(3) If the company (being other than as in the preceding or following sub-sections) undertakes insurance against any loss of or damage to property by accidental causes, including explosions or by reason of larceny, housebreaking or burglary, the capital stock shall be at least \$100,000, with liberty to increase the same as in the first sub-section to \$250,000, of which, as in said sub-section, \$60,000 shall be shown to have been subscribed, and \$11,000 to have been paid into some chartered bank of

Canada. R. S. O. 1887, c. 167, s. 6 (3); cf. 57 V. c. 98 (O); 56 V. c. 78 (D); 54, 5 V. c. 118 (D); 38 V. c. 95 (D); 45 V. c. 102 (D); 52 V. c. 97 (D); 55 V. c. 68 (D).

(4) If the company undertakes bicycle or vehicle insurance, or plate glass insurance, the capital stock shall be at the least \$25,000, with liberty to increase the same as in the first sub-section to \$100,000, of which first mentioned sum \$12,000 at the least shall be shown to have been subscribed, and \$6,000 at the least to have been paid into some chartered bank of Canada. R. S. O. c. 167, s. 6 (2).

7.—The corporate powers of any company, whether incorporated under this Act or under any special Act, shall be forfeited by non-user during three years after the date of incorporation; or if, after a company has undertaken contracts within the intent of this Act, such company discontinues business for one year; or if its license remains suspended for one year; or if its license is terminated otherwise than by mere effluxion of time and is not renewed within the period of sixty days; and thereupon the company's corporate powers shall *ipso facto* cease and determine, except for the sole purpose of winding up its affairs; and in any action or proceeding where such non-user is alleged, proof of user shall be upon the corporation; and the High Court, upon the petition of the Attorney-General, or of any person interested, may by decree limit the time within which the company shall settle and close its accounts, and may for this specific purpose, or for the purpose of liquidation generally, appoint a receiver.

FORMATION AND INCORPORATION OF MUTUAL AND CASH-MUTUAL FIRE INSURANCE COMPANIES.

8. Ten freeholders in any municipality or association of municipalities may call a meeting of the freeholders thereof to consult whether it is expedient to establish therein a fire insurance company upon the mutual or cash-mutual principle. R.S.O. 1887, c. 167, s. 8.

9. The meeting shall be called by advertisement, mentioning the time and place and object of the meeting; and the advertisement shall be published once in the *Ontario Gazette*, and for three weeks in one or more of the newspapers published in the county. R. S. O. 1887, c. 167, s. 9.

10. If thirty freeholders of the municipality are present at the meeting, and a majority of them determine that it is expedient to establish a mutual or a cash-mutual fire insurance company, they may elect three persons from among them to open and keep a subscription-book, in which owners of property, movable or immovable, within the province of Ontario, may sign their names, and enter the sum for which they shall respectively bind themselves to effect insurance with the company. R. S. O. 1887, c. 167, s. 10.

11. Where seventy-five or more persons, being owners of movable or immovable property in the Province of Ontario, have signed their names in the subscription-book and bound themselves to effect insurance in the company, which, in the aggregate, shall amount to \$150,000 at least, a meeting shall be called as hereinafter provided. R. S. O. 1887, c. 167, s. 11.

12. (1) As soon as convenient after the subscription-book has been completed in manner aforesaid, any ten of the subscribers thereto may call the first meeting of the company at such time and place within the municipality as they may determine; such meeting shall be called by sending a printed notice by mail, addressed to every subscriber at his post-office address, at least ten days before the day of the meeting, and by advertisement in one or more papers published in the county in which the municipality is situated. R. S. O. 1887, c. 167, s. 12 (1).

(2) The said notice and advertisement shall contain the object of the meeting, and the time and place at which it is to be held. R. S. O. 1887, c. 167, s. 12 (2).

13. (1) At such meeting (including any necessary or reasonable adjournment of the same) the name and style of the company, including the appellations "fire" and "mutual," shall be adopted, and a secretary *ad interim* appointed, and a board of directors elected as hereinafter provided, and the place named at which the head office of the company shall be located. R. S. O. 1887, c. 167, s. 13 (1).

(2) To constitute a valid meeting for the purposes of the first sub-section, at least twenty-five of the aforesaid subscribers must be present. R. S. O. 1887, c. 167, s. 13 (2).

(3) In case of a country or township the head office may be in any city, town or village within the boundaries of the country or township or adjacent thereto. R. S. O. 1887, c. 167, s. 13 (3).

14.—Copies of the minutes of the said several meetings, of the resolutions adopting the name or style, and the place of the head office of the company, and of the subscription book and the names of the directors elected shall thereupon be made; and all such documents certified as correct under the hands of the chairman and secretary, shall be filed in the office of the Registrar of Deeds for the registry division wherein the head office of the company is situate. R. S. O. 1887, c. 167, ss. 14, 2 (15).

15.—(1) Upon the filing of said documents, with the certificate, the subscribers above mentioned, and all other persons thereafter effecting insurance in the company, (such subscribers or persons being insured on the premium note plan), shall become members of the company and shall be a body corporate by and under the name so adopted. R. S. O. 1887, c. 167, s. 15 (1); s. 2 (14).

(2) But the corporate powers of the company shall as provided by section 7 be forfeited by non-user or discontinuance of business, or by suspension or cancellation of license, which section shall in all respects apply as well to mutual and cash-mutual companies as to joint stock companies. R. S. O. 1887, c. 167, s. 15 (2).

16.—As soon as convenient after the meeting mentioned in section 13, the secretary *ad interim* shall call a meeting of the board of directors, for the election of a president and vice-president from amongst themselves, for the appointment of a secretary, treasurer or manager, and the transaction of such other business as may be brought before them. R. S. O. 1887, c. 167, s. 16.

17.—After the company has filed in the office of the Registrar of Deeds the documents mentioned in section 14, and before the company shall transact or be entitled to transact any insurance business, the chairman and secretary shall transmit or deliver like copies (duly certified by them to be true copies and endorsed by the Registrar or Deputy Registrar of Deeds as having been duly filed) to the Inspector of Insurance at his office in Toronto, accompanied by a statement signed by the chairman and secretary, stating the kind and character of the risks intended to be taken by the company, that is to say, whether the business to be transacted is the insurance of farm and isolated buildings and property, or of mercantile, manufacturing and other hazardous and extra hazardous properties, or of both; also whether the company has been organized and incorporated as a mutual or as a cash mutual company. R. S. O. 1887, c. 167, s. 71; s. 2 (15).

18.—Upon the receipt of such certified copies and of the aforesaid statement by the Inspector, he shall proceed to ascertain whether the proceedings for the corporation of the company have been taken in accordance with the law in that behalf, and whether the subscriptions are *bona fide*, and by persons possessing property to insure, and whether the proposed name is the same as that of any existing company, or may be easily, confounded therewith, and he may require the declaration of any person or persons upon oath to be filed with him, touching any matters concerning which he is called upon to make inquiry. R. S. O. 1887, c. 167, s. 18.

19.—If, upon examination, the Inspector shall find that the said subscriptions have been made in good faith by persons entitled to make the same, and that the

proposed name is satisfactory, and that the company has complied with this Act in respect of deposit, and in all other respects, the Minister may thereupon issue a license under his hand and seal setting forth that the company is thereby licensed to transact the kind of business specified in the license, for the term therein also specified, but not exceeding twelve months from the date of issue; but such license may from time to time be renewed as hereinafter provided. R. S. O. 1887, c. 167, s. 19.

SHARE OR STOCK CAPITAL IN MUTUAL OR CASH-MUTUAL FIRE INSURANCE COMPANIES; CONVERSION OF MUTUAL OR CASH-MUTUAL INTO JOINT STOCK COMPANIES.

20.—Any mutual or cash-mutual fire insurance company, incorporated under this or any former Act, may with the prior assent of the Lieutenant-Governor in Council, raise a share or stock capital of not less than \$100,000, and may with the like assent increase the same from time to time to a sum not exceeding \$500,000: Provided that the same public notice as that prescribed by section 3 has been given by the company of its intention to raise, or to increase such capital. R. S. O. 1887, c. 167, s. 30.

21.—Every subscriber shall, on allotment of one or more shares to him, become a member of the company; with all incidental rights, privileges and liabilities. R. S. O. 1887, c. 167, s. 31.

22.—The shares shall be personal estate, and shall be transferable, but no transfer shall be valid unless made on the books of the company; and, until fully paid up, no share shall be transferable without the consent of the board of directors, nor shall any transfer be valid while any call previously made remains unpaid; and the company shall have a lien on the shares of any shareholder for unpaid calls or other debts due by him to the company, and for any obligation held by the company against him; and after any call, debt or obligation becomes due, the company may, upon one month's notice to the shareholder, his executors or administrators, sell his shares or a sufficient portion thereof to pay the call, debt or obligation, and transfer the shares so sold to the purchaser. R. S. O. 1887, c. 167, s. 32.

23.—The company may, also after default made in the payment of any call upon any share for one month, and after notice having been first given as in the next preceding section mentioned, declare the share and all sums previously paid thereon forfeited to the company, and the company may sell or re-issue forfeited shares on such terms as they think fit for the benefit of the company. R. S. O. 1887, c. 167, s. 33.

24.—After \$100,000 of the stock or share capital has been *bona fide* subscribed, and ten per centum paid thereon into the funds of the company, the company may make insurance for premiums payable wholly in cash; but no insurance on the wholly cash principle shall make the insured a member of the company, or make him liable to contribute or pay any sum to the company, or to its funds, or to any other member thereof, beyond the cash premium agreed upon, or give him any right to participate in the profits or surplus funds of the company, but the company shall not transact any business wholly on the cash principle without first procuring a license from the Minister pursuant to this Act. R. S. O. 1887, c. 167, s. 34.

25.—The net annual profits and gains of the company not including therein any premium notes or undertakings shall be applied, in the first place, to pay a dividend on the share capital, not exceeding the rate of ten per centum per annum, and the surplus, if any, shall be applied in the manner provided by the by-laws of the company. R. S. O. 1887, c. 167, s. 35.

26.—After the share capital has been subscribed as aforesaid, at least two-thirds of the persons to be elected directors of the company in addition to the qualifications required by section 117 of this Act, shall be holders of shares of the capital

stock to the amount of \$1,000 upon which all calls have been duly paid; the other one-third of the directors to be elected shall possess at least the qualifications required by section 117. R. S. O. c. 167, s. 36.

27.—The board of directors of any company which shall raise a share or stock capital under this Act, may make such by-laws, subject to the provisions of this Act, and not inconsistent with or contrary to law, as may be necessary to carry out the objects and intentions of this Act, and to give effect to the provisions thereof; and may rescind, alter, vary, or add to the same from time to time. R. S. O. 1887, c. 167, s. 37.

28.—Any mutual or cash-mutual fire insurance company heretofore incorporated or organized, or which may be hereafter incorporated or organized, under any of the laws of this Province, having surplus assets, aside from premium notes or undertakings, sufficient to re-insure all its outstanding risks, after having given notice once a week for four weeks of their intention, and of the meeting hereinafter provided for, in the *Ontario Gazette* and in a newspaper published in the county where the company is located, with the consent of two-thirds of the members present at any regular annual meeting, and of two-thirds of the subscribers of share or stock capital, or at any special general meeting called for the purpose or with the consent in writing of two-thirds of the members of the company, and the consent also of three-fourths of the directors, and of two-thirds of the subscribers to the share or stock capital, may, as provided in section 3 of this Act, be formed into a joint stock company after application having been made in terms of the said section; and every member of such company, on the day of the said annual or special meeting, or the date of the written consent, shall be entitled to priority in subscribing to the capital stock of the company, for one month after the opening of the books of subscription to the capital stock, in proportion to the amount of insurance held by such members on unexpired risks in force on the day of the annual or special meeting, or the date of the written consent. R. S. O. 1887, c. 167, s. 28.

29.—Any company which may be formed under the provision of the last preceding section shall be answerable for all the liabilities of the company from which it has been formed, and may be sued therefor by or under its new corporate name, and the assets, real and personal, of the old company shall pass to and become vested in the new company. R. S. O. 1887, c. 167, s. 30.

INCORPORATION OF FRIENDLY SOCIETIES.

30.—(1) No company, society, association or organization incorporated after the tenth day of March, 1890, under the Revised Statute respecting Benevolent, Provident and other Societies, or under any Act amending or consolidating the same, shall have authority to undertake or effect for valuable consideration, or to agree or offer so to undertake or effect any contract of insurance within the meaning of section 2 of this Act; and any person who in contravention of this section acts or purports to act for any such corporation in any such contract or offer shall be guilty of an offence punishable as enacted in section 85 of this Act. 53 V. c. 30, s. 9.

(2) No company, society, association or organization incorporated under the Revised Statute respecting Benevolent, Provident and other Societies on or before the tenth day of March, 1890, and not authorized by its original certificate or declaration of incorporation to undertake such contracts as mentioned in the next preceding sub-section shall by virtue of section 19 of the said Revised Statute, or otherwise, have authority to change or extend the purposes of the corporation so as to include the undertaking of such contracts. 53 V. c. 30, s. 9, *proviso*.

31.—If any body duly incorporated to undertake such contracts by virtue of any prior enactment of the Province or to be incorporated by virtue of sections 33 to 38 inclusive of this Act does not go into actual operation within two years after incor-

poration, or, for two consecutive years does not use its corporate powers for the purposes or for the chief purposes set forth in the declaration or in the application for incorporation, such non-user shall *ipso facto* work a forfeiture of the corporate powers except so far as necessary for winding up the corporation; and in any action or proceeding where such non-user is alleged, proof of user shall lie upon the corporation. R. S. O. 1887, c. 172, s. 1; 55 V. c. 39, s. 63 (1); 56 V. c. 32, s. 2 (4).

32.—(1) If after a reasonable time has been given to the corporation to be heard, it appears to the Lieutenant-Governor in Council that any body incorporated under the sections or enactments referred to in sections 30 and 31 is using its corporate powers for any fraudulent or any unlawful purpose, it shall be lawful for the Lieutenant-Governor in Council to suspend for a limited period, or to revoke the said corporate powers, and on any revocation the corporate powers shall *ipso facto* absolutely cease and determine, except for the sole purpose of winding up the affairs of the corporation; and the High Court upon the petition of the Attorney General, or of any person interested, may, by judgment or order limit the time within which the corporation shall settle and close its accounts, and may for this specified purpose, or for the purpose of liquidation generally, appoint a receiver. 55 V. c. 39, s. 10 (1).

(2) Notice of any suspension or revocation of corporate powers as aforesaid shall be given in the *Ontario Gazette*, and also elsewhere if the Lieutenant-Governor in Council so determine. 53 V. c. 39, s. 10 (2).

(3) If during the suspension, or after the revocation of its corporate powers, any director, officer, agent, employee, or other person acting or purporting to act in behalf of the body theretofore incorporated, undertakes any contract of insurance within the meaning of this Act, he shall be guilty of an offence punishable as enacted in section 85 of this Act. 53 V. c. 39, s. 11 (1).

33.—(1) Where a friendly society registered under this Act has its head office elsewhere than in the Province of Ontario, the Grand or other Provincial body, or the lodges or a majority of the lodges situated in the Province may file with the Insurance Registrar an application or applications for Provincial incorporation, setting forth the facts of the case and the proposed corporate name, and head office, and the purposes and rules of the society; also naming those persons who are to be its first trustees or managing officers, and stating the mode in which their successors are to be elected; also furnishing such other information as the Registrar requires. 56 V. c. 32, s. 2 (1).

(2) Upon due application made the Registrar may name a day for the hearing of the application, and such public notice of the hearing shall be given in the *Ontario Gazette* and otherwise as the Registrar shall direct. 56 V. c. 32, s. 2 (2).

(3) If, upon the hearing, it appears to the Registrar that such incorporation ought to be granted, he shall have authority to certify in duplicate, or in as many parts as may be required, under his hand and the seal of his office, that he finds entitled to incorporation under the name and for the purposes specified in the certificate, the persons mentioned therein. 56 V. c. 32, s. 2 (3).

(4) One of the original parts of the certificate shall be filed in the office of the Provincial Registrar, together with such other documents as the Insurance Registrar shall by his certificate require to be filed; and from the day of such filing the persons mentioned in the Insurance Registrar's certificate and their associates and successors shall thenceforward be a body corporate and politic, and shall have the powers, rights and immunities vested by law in such bodies. 56 V. c. 32, s. 2 (4).

(5) Upon due application the Insurance Registrar shall have authority to admit to registry as a friendly society the body so incorporated. 56 V. c. 32, s. 2 (5).

34. Where it is in the opinion of the Insurance Registrar necessary or expedient that an auxiliary, or local or subordinate body or branch of a registered society should be separately incorporated, or separately registered, or both, or that two or

more societies should be incorporated or registered as one society, the Insurance Registrar may direct the like proceedings to be taken as in the next preceding section enacted, and the filing of his certificate in the office of the Provincial Registrar shall have the same effect as therein enacted; also upon due application the body so incorporated may be registered. 56 V. c. 32, s. 3.

35. Any unincorporated lodge or body controlled by a registered society, and operated under the uniform rules prescribed by the said society, and not contrary to law, may, through the society, make application to the Insurance Registrar for incorporation; if upon due application it appears to him that incorporation ought to be granted, he may certify the same under his hand and the seal of his office; and the filing of his certificate in the office of the Provincial Registrar shall have the same effect as enacted in section 33. 56 V. c. 32, s. 4 (1).

36. (1) The officers of any superannuation or benefit fund authorized by sub-section 7 of section 504 of *The Consolidated Municipal Act, 1892*, or by sub-section 12 of section 496 thereof, or established by virtue of any prior or amending municipal Act, or by virtue of any Act authorizing the establishment of a benefit fund for policemen or firemen, and the officers of any benefit fund established by virtue of section 48 of chapter 145 of the Revised Statutes, 1887, may upon like proceedings taken as enacted in section 33 hereof, become incorporated with the same limitations of corporate powers; and the body so incorporated may, upon due application, be admitted to registry. 56 V. c. 32, s. 5.

(2) The provisions recited in the next preceding sub-section shall be deemed to include any provision amending, revising or consolidating the said provisions respectively.

37. Where a friendly society has its head office in Ontario, and the society or the lodges of the society were, on the tenth day of March, 1890, and also on the thirty-first day of December, 1892, in actual and active operation, and though the society, being at the first mentioned date entitled to incorporation, did not on or before that date take out incorporation, the Registrar of Friendly Societies, upon proof of the facts, shall have authority to issue a certificate of incorporation as in section 33 hereof enacted, and the filing of such certificate in the office of the Provincial Registrar shall have the same effect as therein provided; upon due application the society so incorporated may be registered. 53 V. c. 32, s. 6.

38. (1) Upon like proceedings taken as enacted in section 33, incorporation may be granted in either of the two following cases:—

(a) Where any trade or labor union, or trade or labor organization proposes to undertake contracts with its own members exclusively, for any of the insurance benefits enumerated in and permitted by sub-section 3 of section 62, or contracts to furnish tools or to pay unemployed or superannuation benefits to the said members. 57 V. c. 48, s. 2 (1a); 58 V. c. 34, s. 1 (8).

(b) Where any organization of persons resident in Ontario, consisting of not less than twenty-five members, and managed and operated as a friendly society under rules conforming to this Act, proposes to contract with its own members exclusively for sick benefits, not exceeding five dollars per week and a funeral benefit of not more than one hundred dollars, or either of such benefits. 57 V. c. 48, s. 2 (1b).

(2) The body so incorporated may, upon due application, be admitted to registry as a friendly society; but unless and until so registered, the corporation shall not undertake, nor agree or offer to undertake, any contract insuring the said or other insurance benefits. 57 V. c. 48, s. 2 (2).

39. Where any society, association, union, organization or lodge already incor-

porated under a prior Act of this Province becomes incorporated under this Act, such prior incorporation shall be deemed to have been merged in and superseded by the said later incorporation. 57 V. c. 48, s. 3.

CHANGE OF NAME OR OF HEAD OFFICE.

(All Provincial Insurance Corporations.)

40. (1) Where an insurance corporation within the legislative authority of this Province is desirous of adopting a name different from that by which it was incorporated, or where in the opinion of the Insurance Registrar the name by which the corporation was incorporated may be easily confounded with that of any other existing corporation, or is otherwise on public grounds objectionable, the Lieutenant-Governor in Council, upon the recommendation of the said Registrar, approved by the Minister, may change the name of the corporation to some other name to be set forth in the Order-in-Council; but no such change of name shall affect the rights or obligations of the corporation; and all proceedings which might have been continued or commenced by or against the corporation by its former name may be continued or commenced by or against the corporation under its new name. 55 V. c. 39, s. 24 (1); R. S. O. 1887, c. 167, s. 145.

(2) The head office of a corporation may be changed upon the like procedure. 58 V. c. 34, s. 5 (6).

(3) Of any such change of name or head office, such public notice shall be given in the *Ontario Gazette* and otherwise as the Registrar shall direct. 55 V. c. 39, s. 24 (2); 58 V. c. 34, s. 5 (7).

GOVERNMENT DEPOSITS.

41.—(1) Except mutual fire insurance companies licensed only for the insurance of farm buildings and of isolated risks (such risks being other than mercantile and manufacturing risks) every company applying for a Provincial license to transact insurance shall, before the original issue or the renewal of the license, or of registry, lodge with the Minister the initial or the renewal deposits respectively below stated, and the said deposits shall be made in cash or in deposit receipts of chartered banks of Canada, or in the stock or bonds of the Dominion of Canada or of this Province, or in deposit receipts or terminable debentures of any corporation in the obligations of which trustees may under the law of this Province invest trust moneys: Provided that this section in so far as it alters the amount of the deposit required by statutes heretofore in force shall not apply to such companies as have heretofore reported to the Department of Insurance, but shall, from the passing of this Act, apply to all other companies thereafter licensed. R. S. O. 1887, c. 167, s. 40 (1); 54 V. c. 37, s. 2.

(2) The initial deposit to be made by any corporation liable to make deposit before the original or initial registry shall be the sum appointed for such corporation in sub-section 4 of this section. R. S. O. 1887, c. 167, s. 40 (2).

(3) Before the annual renewal of registry the amount of deposit required of any such corporation shall on or before the first day of July in each year be re-adjusted in terms of the next following two sub-sections. R. S. O. 1887, c. 167, s. 40 (3).

(4) If on the preceding 31st day of December in any year the corporation's total contingent liability or amount at risk does not exceed \$2,000,000:

(a) Then every joint stock fire or fire and inland marine insurance company, and every life or life and accident company, and every guarantee and surety company shall keep on deposit with the Minister, if a Provincial or Canadian company, \$25,000, and if a foreign company, \$50,000. R. S. O. 1887, c. 167, s. 40 (4).

(b) Every accident company, if Provincial or Canadian, shall keep on deposit with the Minister \$20,000, and if a joint stock foreign company, \$40,000. R. S. O. 1887, c. 167, s. 40 (4).

- (c) Every Provincial mutual fire, or fire and inland marine company, insuring mercantile and manufacturing risks, shall keep on deposit with the Minister \$10,000, and every Provincial cash mutual fire, or cash mutual fire and inland marine company, \$10,000. R. S. O. 1887, c. 167, s. 40 (4).
 - (d) Every live-stock insurance company shall keep on deposit as aforesaid, if Provincial or Canadian, \$10,000, and if foreign joint stock, \$25,000. R. S. O. 1887, c. 167, s. 40 (4).
 - (e) Every insurance company within the intent of sub-section 3 of section 6 shall keep on deposit, as aforesaid, if Provincial or Canadian, \$10,000, and if foreign joint stock \$20,000. R. S. O. 1887, c. 167, s. 40 (4).
 - (f) Every insurance company within the intent of sub-section 4 of section 6 shall keep on deposit as aforesaid, if Provincial or Canadian, \$5,000, and if foreign joint stock, \$10,000.
 - (g) Every foreign company doing only the business of re-insuring fire risks undertaken by companies standing registered under this Act shall keep on deposit, as aforesaid, \$10,000.
 - (h) Every non-provincial friendly society within the intent of sub-section 6 of section 60, shall keep on deposit \$5,000.
- (5) If on the preceding 31st day of December in any year, the corporation's total contingent liability, or the amount of insurance in force (insured or reinsured) exceeds \$2,000,000, then for each additional \$1,000,000 or fraction thereof, the corporations enumerated in the next preceding sub-section shall respectively keep on deposit, with the Minister, by way of additional security, a sum equal to one-fifth of the initial deposit, and the additional deposit shall be either in cash or securities as aforesaid. R. S. O. 1887, c. 167, s. 40 (5).

42.—(1) Securities of the Dominion of Canada, or securities issued by any of the Provinces of Canada, shall be accepted at their market value at the time when they are deposited. R. S. O. 1887, c. 167, s. 41 (1).

(2) The other securities above specified shall be accepted at such valuation and on such conditions as the Minister may direct, and the Inspector shall under the name of each company keep a record of the securities deposited on its account, naming in detail the several securities, their par value, and the value at which they are received as deposit. R. S. O. 1887, c. 167, s. 41, s. 53 (5).

(3) If the market value of any of the securities which have been deposited by any company declines below the value at which they were deposited, the Minister may, from time to time, call upon the corporation to make a further deposit, so that the market value of all the securities deposited by any company shall be equal to the amount which they are required to deposit by this Act. R. S. O. 1887, c. 167, s. 41 (3).

(4) Where any security, obligation or covenant, or any interest in any real or personal estate, effects, or property, is given, or transferred to, made with, or vested in the Minister, by virtue of his office, such security, obligation or covenant, and any rights of action in respect thereto, and all the estate, right, or interest of the said Minister in respect of such real or personal estate, effects or property upon the death, resignation or removal from office of the Minister from time to time, and as often as the case happens and the appointment of a successor takes place, shall (subject to the same trusts as the same were respectively subject to), vest in the succeeding Minister by virtue of this Act, and shall and may be proceeded on by any action or in any other manner, or may be assigned, transferred or discharged, in the name of such succeeding Minister, as the same might have been proceeded on, assigned, transferred or discharged by the Minister to, with or in whom they were first given, transferred, made, or vested if he had continued to hold office. R. S. O. 1887, c. 167, s. 41 (4).

(5) Every such security, obligation, covenant or interest in real or personal estate, effects and property may in like manner as in the last section mentioned be proceeded on, assigned, transferred or discharged by and in the name of any mem-

ber of the Executive Council of Ontario, acting under the authority of section 3 of *The Act respecting the Executive Council*. R. S. O. 1887, c. 167, s. 41 (5).

(6) Sub-section 4 of this section shall apply to every security, obligation or covenant, and every interest in real or personal estate, effects or property given or transferred to, made with, or vested in any former Minister, by virtue or on account of his office, and shall transfer all the interest, rights and estate of the former Minister to the present Minister, to be vested in him by virtue of his office and subject to the provisions of this Act. R. S. O. 1887, c. 167, s. 41 (6).

(7) Where any company desires to substitute other securities within the intent of section 41 for securities deposited with the Minister, the Minister, if he thinks fit, may permit the substitution to be made. R. S. O. 1887, c. 167, s. 41 (7).

43.—(1) A deposit of any amount not falling below \$5,000 may voluntarily be made by any registered friendly society; an insurance company may also voluntarily make a deposit in excess of the amount required by section 41, and such further deposit by the company shall be dealt with as if the same had been part of its original deposit. Cf. R. S. O. 1887, c. 167, s. 42.

(2) All such voluntary deposits shall be made in the form prescribed by sub-section 1 of section 41, and no part of such voluntary deposits shall be withdrawn except with the sanction of the Minister: Provided the interest upon the securities forming the deposit shall be handed over to the depositing corporation. R. S. O. 1887, c. 167, s. 42.

44.—A company having made a deposit under this Act shall be entitled to withdraw the deposit, with the sanction of the Lieutenant-Governor in Council, whenever it is made to appear to the satisfaction of the Lieutenant-Governor in Council that the company is carrying on its business of insurance under license from the Dominion of Canada. Cf. R. S. O. 1887, c. 167, s. 43.

45.—If from the annual statements, or other examination of the affairs and condition of any company, it appears that the re-insurance value of all its risks outstanding in Ontario, together with any other liabilities in Ontario, exceeds its assets in Ontario, (including the deposit in the hands of the Minister) then the company shall be called upon by the Minister to make good the deficiency at once, and on failure so to do its license may be suspended or may be cancelled, and in case of cancellation, if a Provincial corporation, its corporate powers shall thereupon cease and determine, except for the purpose of winding up its affairs as provided in section 7. R. S. O. 1887, c. 167, s. 44.

46.—Except in cases with respect to which it may be otherwise provided by the Lieutenant-Governor in Council, so long as any company's deposit is unimpaired and no notice of any final judgment or order to the contrary is served upon the Minister, the interest upon the securities forming the deposit shall be handed over to the company. R. S. O. 1887, c. 167, s. 45.

47.—Where a company fails to make the deposits under this Act at the time required, or where written notice has been served on the Minister of an undisputed claim arising from loss insured against in Ontario remaining unpaid for the space of sixty days after being due, or of a disputed claim after final judgment in a regular course of law and tender of a legal valid discharge being unpaid, so that the amount of securities representing the deposit of the company is liable to be reduced by sale or administration of any portion thereof, the license of the company may be suspended, or may be cancelled; but in case of suspension under this or the preceding section the license may be revived, and the company may again transact business, if within sixty days after notice to the Minister of the company's failure to pay any undisputed claim, or the amount of any final judgment as provided in this section, such undisputed claims or final judgments upon or against the company in Ontario

are paid and satisfied, and the company's deposit is no longer liable to be reduced below the amount required by this Act. R. S. O. 1887, c. 167, s. 46.

48.—The securities deposited with the Minister shall be subject to administration only in respect of any contract which falls within the intent of section 2, and which further has for its subject some property in the Province, or property in transit to or from the Province, or the life, safety, health, fidelity, or insurable interest of some resident of the Province, or where the contract itself makes the payment thereunder primarily payable to some resident of the Province. R. S. O. 1887, c. 167, s. 47.

49.—(1) Under an order of the High Court any company shall be liable to have its deposit in the hands of the Minister administered in manner hereinafter mentioned upon the failure of the company to pay any undisputed claim arising under any contract within the intent of section 48 for the space of sixty days after being due, or, if disputed, after final judgment and tender of a legal valid discharge, and (in either case) after notice thereof to the Minister, and to the Insurance Registrar. In case of such administration, the whole deposit of the company, held by the Minister, shall, after the costs of administration have been provided for, be deemed to be assets for the holders of such contracts, whose rights as among themselves shall be determined as provided for in sub-section 4 of section 192. R. S. O. 1887, c. 167, s. 48 (1).

(2) In any case where a claim accruing on the occurrence of any event is by the terms of the contract payable on proof of such contract, without any stipulated delay, the notice required under this section shall not be given until after the lapse of sixty days from the time when the claim becomes due. R. S. O. 1887, c. 167, s. 48 (2).

50.—(1) Before the application is made to the said Court for the administration of a company's deposit at least ten days' notice in writing of such intended application, setting out the grounds thereof, shall be served on the Minister, and also upon the Insurance Registrar; and the notice shall designate sitting of the Court to which application is proposed to be made, and shall state the day named for the hearing of the same. R. S. O. 1887, c. 167, s. 49.

(2) If an order for administration is granted, the company shall be deemed to have thereby become unregistered. In the case of a Provincial company, the winding up of the company shall be deemed to have commenced under section 187 as from the date of the administration order. In the case of a foreign or extra-Provincial company, upon motion of any person interested in the administration or of the Insurance Registrar, the Master in Ordinary shall appoint a competent and otherwise suitable person to be administrator, and in respect of the administration the said Master shall have the like powers and duties as in the case of a receivership under this Act. 55 V. c. 39, s. 53.

51.—Where a company has ceased to transact business in Ontario, and has given written notice to that effect to the Minister and to the Insurance Registrar, it shall re-insure all such outstanding contracts as are within the intent of section 48 in some company or companies registered to do business in Ontario, or obtain a discharge of such contracts, and its securities shall not be delivered to the company until such reinsurance is effected to the satisfaction of the Minister. R. S. O. 1887, c. 167, s. 51.

52.—Upon making application for its securities the company shall file with the Insurance Registrar a list of all contracts within section 48 which have not been so re-insured or have not been discharged; and it shall at the same time publish in the *Ontario Gazette* a notice that it has applied to the Lieutenant-Governor in Council for the release of its securities on a certain day, not less than three months after

the date of the notice, and calling upon all claimants, contingent or actual, opposing the release to file their opposition with the Insurance Registrar on or before the day so named; and after that day, if the Minister is satisfied that the company has ample assets to meet its liabilities under section 48, all the securities may be released to the company by an order of the Lieutenant-Governor in Council, or a sufficient amount of them may be retained to cover the claims filed, and the remainder may be released, and thereafter from time to time as such opposing claims lapse, or proof is adduced that they have been satisfied, further releases may be made on the authority aforesaid. Cf. R. S. O. 1887, c. 167, s. 52.

LICENSING OF INSURANCE COMPANIES.

53.—(1) All insurance corporations not being the companies within the intent of section 50, and not being friendly societies within the intent of section 60, shall, before becoming entitled to registry, obtain a license from the Minister.

(2) Applicants for license shall file with the Insurance Registrar the documents mentioned in sections 3 and 17, and also the documents hereinafter required of an applicant for registry; and shall before license comply with the provisions of section 41 relating to deposits.

(3) As soon as the company applying for license has deposited the securities hereinbefore mentioned, and has otherwise conformed to the requirements of this Act, the Minister may issue the license. R. S. O. 1887, c. 167, s. 58.

(4) The license shall be in such form as may be from time to time determined by the Minister, and shall specify the business to be carried on by the company; and shall expire on the thirtieth day of June in each year, but shall be renewable from year to year. A record of the licenses and supplementary licenses as they are issued or renewed shall be kept in the office of the Insurance Registrar. R. S. O. 1887, c. 167, s. 57; s. 53 (5); s. 60 (2).

(5) Licensees under this section shall be entitled to be registered as provided in section 58.

(6) Where a company desires to extend its business to some other branch of insurance within the intent of this Act, and has complied with the law in respect of additional deposit and otherwise, the Minister may, on the report of the Insurance Registrar, issue to the company a supplementary license authorizing it to undertake such other branch of business. R. S. O. 1887, c. 167, s. 60 (1).

(7) The provisions herein enacted as to the continuance, renewal, suspension and cancellation of licenses shall equally apply to supplementary licenses. R. S. O. 1887, c. 160, s. 60 (3).

(8) Although a company has ceased to transact business in Ontario after the notice by this Act required, and its license has in consequence been withdrawn, the company shall nevertheless pay the losses arising from policies not re-insured or surrendered as if the license had not been withdrawn. R. S. O. 1887, c. 167, s. 61.

REGISTRATION OF INSURANCE CORPORATIONS.

54. After the 31st day of December, 1892, no insurance other than as enacted by and for the purposes of *The Land Titles Act*, and other than contracts of guarantee undertaken by a company standing registered under *The Loan Corporations Act*, shall be transacted or undertaken in Ontario except by a corporation duly registered as herein provided. 55 V. c. 39, s. 3.

Provided that no superannuation or insurance or annuity fund, managed or controlled by the Government of the Dominion of Canada for the benefit of the civil service thereof shall require to be registered. 56 V. c. 32, s. 10 (3).

55. Two registers shall be opened and kept as follows :—

(1) A register of the corporations enumerated in sections 58 and 59; this register?

which may be known as "The Insurance Company Register," shall be kept in the office and under direction of the Inspector of Insurance. 55 V. c. 39, s. 4 (1).

(2) A register of friendly societies authorized hereunder by certificate of registry to undertake insurance contracts, or contracts in the nature of insurance; this register, which may be known as "The Friendly Society Register," shall be kept in the office and under the direction of the Registrar of Friendly Societies, who may be the Inspector of Insurance, or such other person as the Lieutenant-Governor in Council shall appoint; and such assistants may, by the same authority, be appointed as from time to time the case requires: Provided, the first Registrar of Friendly Societies shall be the Inspector of Insurance. 55 V. c. 39, s. 4 (2), s. 11 (1).

(3) In this Act "Registrar" or "Insurance Registrar" means the Inspector of Insurance or the Registrar of Friendly Societies, according as the matter pertains to an insurance company or to a friendly society respectively.

56. (1) The duty of determining and distinguishing those corporations which under this Act are required to be registered and are legally entitled to registry, and of granting registry accordingly, shall devolve upon the Insurance Registrar subject to appeal as hereinafter provided. 55 V. c. 39, s. 7 (1), s. 11 (2).

(2) For purposes of his duties under this Act, or under any other Act relating to insurance, the Registrar may require to be made, and may take and receive affidavits and depositions, and may examine witnesses upon oath; and the Registrar shall have the same power to summons officers of corporations, receivers and liquidators and other persons to attend as witnesses, to enforce their attendance, and to compel them to produce books and documents and to give evidence as any court has in civil cases. 55 V. c. 39, s. 7 (2); 58 V. c. 34, s. 3 (4), s. 5.

INSURANCE COMPANY REGISTER: WHAT CORPORATIONS MAY BE REGISTERED THEREON.

57. Insurance companies which, at the passing of this Act, stand duly registered as such shall be admissible to registry on the Insurance Company Register.

58. (1) Insurance licensees of the Province of Ontario shall be entitled on the issue or the renewal of their licenses to be registered, without additional charge, upon the Insurance Company Register, and the fact of such registration shall before delivery over of the license, original or renewed, be endorsed thereon. 55 V. c. 39, s. 5 (1).

(2) Suspension or cancellation or non-renewal of the license issued under this Act shall, *ipso facto*, and without notice from the Insurance Registrar, operate in the respective cases as suspension or cancellation of registry. 55 V. c. 39, s. 5 (2).

59. (1) Insurance licensees of the Dominion of Canada may, upon due application and upon proof of such license subsisting, be registered on the Insurance Company Register. 55 V. c. 39, s. 6 (1); 58 V. c. 34, s. 3 (3).

(2) For purposes of this Act such licensees shall include corporations authorized by any instrument or document issued prior to the 16th day of April, 1895, under or by virtue of section 38 of *The Insurance Act of Canada*, or issued upon the security of a substantial deposit under section 39 of said Act, or issued under other provisions thereof upon such security; and every licensee licensed under or by virtue of *The Insurance Act of Canada* shall be deemed to be a corporation for the purposes of registration under this section. 55 V. c. 39, s. 6 (2); 58 V. c. 34, s. 3 (3).

(3) Where a corporation licensed or authorized under section 39 of *The Insurance Act of Canada* is registered under this Act, every policy and certificate issued and used in Ontario shall conform and be subject to the provisions of the said section; and upon any contravention of the said section the corporation shall be liable to have its registry under this Act suspended or cancelled. 55 V. c. 39, s. 41 (2).

(4) Suspension or cancellation of the authorization of a corporation under *The*

Insurance Act of Canada shall, *ipso facto*, and without notice from the Registrar, operate in the respective cases as suspension or cancellation of registry under this Act. 55 V. c. 30, s. 6 (3).

Provided, that when, after such suspension of authorization under *The Insurance Act of Canada*, the corporation has under the said Act been permitted to revive its authorization, the Registrar may grant a revivor of registry and issue his certificate of the same. 55 V. c. 30, s. 6 (3).

(5) Corporations, companies or insurers within the intent of section 3 (a), or 32 of *The Insurance Act of Canada*, may, upon due application, be admitted to registry as if licensed under the said Act. 56 V. c. 32, s. 10 (5).

(6) Upon due application of any underwriter of the establishment or society known as Lloyd's, and more particularly described in an Act passed by the Parliament of the United Kingdom in the thirty-fourth and thirty-fifth years of Her Majesty's reign, and chaptered 21, or upon due application of any such underwriter's broker, or broker's agent, such underwriter, broker or agent may be registered for the undertaking and transaction of marine insurance. 56 V. c. 32, s. 10 (5).

(7) For purposes of the two next preceding sub-sections, the term of annual registry shall commence and end at the respective dates hereinafter prescribed in the case of insurance licensees of the Dominion of Canada. 56 V. c. 32, s. 10 (5).

FRIENDLY SOCIETY REGISTER : WHAT CORPORATIONS MAY BE REGISTERED THEREON.

60.—In addition to friendly societies standing duly registered as such at the passing of this Act, the following shall be admissible to registry on the Friendly Society Register :

(1) Societies from time to time incorporated by virtue of sections 33, 34, 36, 37 and 38 of this Act.

(2) Any corporation not provided for elsewhere herein which has, by virtue of an Act of the Parliament of Canada, an insurance and provident society or association, or an insurance or guarantee fund in connection with the corporation, may upon due application for registry under this Act, be registered on the Friendly Society Register. 55 V. c. 30, s. 9 (2) ; 58 V. c. 34, s. 5 (1).

(3) Any lawfully incorporated trades union in Ontario which, under the authority of the incorporating Act, has an insurance or benefit fund for the benefit of its own members exclusively, shall, upon due application for registry hereunder be entitled to be registered on the Friendly Society Register. 55 V. c. 30, s. 9 (3).

Provided, that where any *bona fide* trade union or labor organization provides by its constitution, by-laws or rules for the assistance, relief or support of its members, the Registrar may, by writing, under his hand and the seal of his office, declare the organization exempt from the operation of this Act ; and such certificate shall remain valid until by like writing revoked ; and the organization so exempted shall not be subject to any penalty imposed by this Act. 55 V. c. 30, s. 9 (3) ; 56 V. c. 32, s. 10 (7).

(4) Any corporation in Ontario which at the passing of this Act has under authority of an Act of Canada created a fund for paying a gratuity on the happening of death, sickness, infirmity, casualty, accident, disability or any change of physical or mental condition, shall, upon due application for registry hereunder, be entitled to be registered on the Friendly Society Register. 55 V. c. 30, s. 9 (4).

(5) Any association of the civil servants or employees of the Dominion of Canada, incorporated by virtue of an Act of the Parliament of Canada may, upon due application, be admitted to registry. 56 V. c. 32, s. 10 (7).

(6) When and so long as any other Province of Canada by virtue of reciprocal law admits to that Province (upon the like terms as in this section specified) friendly societies incorporated by Ontario, the friendly societies of such Province may be admitted to registry upon due application and compliance with section 41 as to deposit :

Provided that no applicant under this sub-section shall be admissible to registry, initial or renewed,—

- (a) Unless the applicant body has for the five years next preceding its application continuously been in actual and active operation as a solvent corporation in that Province of Canada under the law of which it was incorporated; also that at the time of its application it is not in a condition of actual or impending insolvency.
- (b) If it undertakes insurance, or insurance benefit contracts with persons other than its own members; or
- (c) If it insures or indemnifies against contingencies other than sickness, disability, or death; or funeral expenses; or if the sum or sums insured on the life of any one person exceed in all \$3,000; or
- (d) If it undertakes any endowment insurance, or any endowments whatever; or if it undertakes any annuities whatsoever on lives; or undertakes investment bond or tontine, or semi-tontine, or marriage aid contracts; or
- (e) If the corporation has in good standing upon its books less than five hundred members; or
- (f) If the corporation is in effect the property of its officers or collectors, or belongs to any private proprietary; or if the corporation is conducted as a trading or mercantile venture, or for purposes of commercial gain; or if the funds of the corporation are in the control of persons holding office for life, or if the funds are not in the effective control of the persons insured; and
- (g) Unless the applicant body (when the application is made after the 30th day of June, 1898) provides for its contracts upon lives to at least the extent of collecting from its members premiums respectively not less than those set out in Schedule A to this Act, and is collecting in addition to the said premiums such further sum as is reasonably sufficient to provide for the expenses of management.

On proof of the foregoing and on production of the certificate of registry of the proper officer of its own Province—if registry is required by the law of that Province—the society shall be entitled to registry under this Act, and from year to year the society shall show that it is then in good standing under the law of its own Province.

61. (1) Any incorporated company standing registered under this Act, having not less than twenty-five officers, employees or servants, instead of taking private sureties or the bonds of a guarantee company, may, by arrangement with its employees, contract to insure their fidelity by means of a guarantee fund provided as may be agreed out of the salaries or wages of such officers, employees or servants, the whole to be conducted under rules and a form or forms of contract approved in writing by the Insurance Registrar, which may from time to time be amended under his direction or with his assent in writing, and such rules and forms, original and amended, shall from time to time be filed and indexed in the office of the Provincial Registrar. 58 V. c. 34, s. 10 (1).

(2) The said company may upon due application be admitted to registry upon the Friendly Society Register, and may from time to time upon due application so made renew its registry, but unless and until so registered, and unless it stands registered, the said company shall not undertake, nor agree or offer to undertake, any contract by this section authorized, or within the intent of this Act, and the term of registry shall be as provided under section 69 of this Act. 58 V. c. 34, s. 10 (2).

(3) The fees payable to the Provincial Treasurer in respect of the said registry shall be the same as provided in sub-division 1 of division III. of section 197 of the Act, except that as to the certificate of registry (original or renewed), the fee shall be \$10. 58 V. c. 34, s. 10 (3).

62. The following shall not be entitled to register as a friendly society:—

(1) Any corporation within the meaning of sections 58 and 59, or licensed or required by law to be licensed for the transaction of business as an insurance corporation. 55 V. c. 39, s. 4 (2) *a*.

(2) Any corporation, except as enacted in sub-section 4 of section 60, having charge of, or managing, or distributing charity, or gratuities, or donations only. 55 Vic. c. 39, s. 4 (2) *b*.

Provided, that where before the 11th day of March, 1891, a corporation was incorporated under *The Act respecting Benevolent, Provident and other Societies*, for the purpose of bestowing gratuities at death or on the happening of sickness, infirmity, casualty, accident, disability, or any change of physical or mental condition, and it is in the opinion of the Registrar desirable that such payments should be made matter of contractual obligation, the corporation may for this purpose amend its constitution or rules as shall be directed by the Registrar under his hand and the seal of his office; and if, within the time limited in the Registrar's direction, the corporation files in the office of the Provincial Registrar, the said direction, and a declaration, verified by the oath of its secretary, or other proper officer, setting out the amendments so directed and made in the constitution or rules with the date of the said amendment; then, upon proof of such filing, the Registrar may admit the corporation to registry as a friendly society. 55 V. c. 39, s. 4 (2*b*); 58 V. c. 34, s. 3 (2).

Provided also, in any case of doubt where the *bona fide* intention of a society is to afford charitable aid or relief, and not to create either any contractual right in the members or any contractual obligation against the society, upon the society making such intention apparent in its rules and publications (by such amendment, if necessary, as the Registrar shall direct), the Registrar may by writing, under his hand and the seal of his office, declare the organization exempt from the operation of this Act, and such certificate shall remain valid until by like writing revoked, and the society so exempted shall not be subject to any penalty imposed by this Act. 56 V. c. 32, s. 10 (4).

(3) Any corporation undertaking or offering to undertake insurance other than contracts of insurance made exclusively with its own members against sickness, accident, disability, infirmity, or old age, or for mortuary or funeral benefits, or contracts for the fidelity of officers, servants, or employees of the corporation (including branches or subdivisions thereof), or for a sum or for collective sums not exceeding \$3,000 in all, payable at the death of the assured.

Provided, that upon proof of a friendly society duly incorporated, organized and operated under the law of Ontario or of Canada before the eleventh day of March, 1890, that the society was at the said date transacting exclusively with its members endowment insurance in Ontario, *bona fide*, and has so continued up to the date of application for registry, the Registrar shall have authority to admit the society to registry as a friendly society transacting endowment insurance according to the terms of the certificate of registry. 55 V. c. 39, s. 4 (2*C a*).

Provided, also, that contracts entered into before the fourteenth day of April, 1892, shall not hereby be invalidated. 55 V. c. 39, s. 4 (2*C b*).

(4) Any corporation in which the persons insured number less than twenty-five; or in which the insurance fund is used as a trading or mercantile venture, or for purposes of commercial or private gain; or any society organized on the lodge system, the insurance funds of which are held other than as trust funds for the members insured by the society. 55 V. c. 39, s. 4 (2*D*).

63.—(1) No friendly society heretofore admitted to registry as being then within the intent of *The Act respecting Benevolent, Provident and other Societies*, and also within the intent of *The Insurance Corporations Act, 1892*, shall be deemed to be managed and operated according to the true intent of the said Acts, unless the persons insured in or by the society exercise, either directly or through representa-

tives elected for a term not exceeding three years, effective control over the insurance funds of the society; and no corporation whatsoever, wherein the persons, who by virtue of their office have the disposition, control or possession of the insurance funds hold such office for life, shall be eligible for registry as a friendly society under this Act. 55 V. c. 30, s. 8 (2).

Provided that, where a corporation otherwise entitled to registry under this Act, is, in the opinion of the Registrar, debarred by reason of some particular clause or clauses in the rules of the corporation, the corporation or the executive board thereof (by whatever name known), may, under the direction of the Registrar, amend its rules in like manner as provided in subsection 2 of section 62 of this Act; and thereupon the Registrar may admit the corporation to registry as a friendly society. 55 V. c. 30, s. 8 (2); 58 V. c. 34, s. 3 (5).

(2) No society applying for registry or renewal of registry by virtue of its incorporation under any Act of Ontario shall be deemed to be entitled to be registered on the Friendly Society Register unless its head office is situated and maintained in Ontario, and unless the secretary and treasurer are *bona fide* residents of the Province. This subsection shall take effect on, from and after the 1st day of January, 1895. 56 V. c. 32, s. 10 (6); 58 V. c. 34, s. 3 (6).

PROCEEDINGS TO REGISTRY: DURATION OF REGISTRY.

64.—(1) Application of any insurance corporation for initial registry under this Act, shall be made according to a form to be supplied by the Registrar on request, and the applicant shall deliver to the Registrar at his office the application, duly completed, together with such evidence as the form by its terms requires, and the applicant shall furnish such information, material and evidence, or give such public notice of the application as the Registrar shall direct; in the case of corporations transacting or undertaking, or offering to undertake or transact insurance in Ontario at the 14th day of April, 1892, such corporation shall have made due application for initial registry on or before the 30th day of June, 1892. 55 V. c. 30, s. 12 (1).

Provided that the material required of a friendly society by this subsection shall include duplicate certified copies of the constitution, laws, rules and regulations of the society, and also of Ontario branches thereof, which documents shall be filed with the Registrar, as shall also all amendments thereto made from time to time thereafter. 55 V. c. 30, s. 12 (1).

(2) On sufficient cause shown and upon payment to the Provincial Treasury of the fee hereinafter prescribed, the Registrar may by writing under his hand and the seal of his office extend the time for the delivery of an application, or for the prosecution or completion of an application already delivered or tendered. 55 V. c. 30, s. 12 (2).

65.—The applicant corporation not being a corporation within the intent of sections 58 and 59 of this Act, shall further deliver to the Registrar a statement in such form as is required by the said officer of the financial condition and affairs of the corporation on the 31st day of December then next preceding, or up to the usual balancing day of the corporation, if such balancing day is not more than twelve months before the filing of the statement, and such statement showing the corporation to be solvent shall be signed by the president and secretary or other proper officers of the corporation, and shall be verified by their oath. 55 V. c. 30, s. 13.

66.—(1) Where any corporation applying for initial registry has its head office elsewhere than in Ontario, its application for registry shall be accompanied by a power of attorney from the corporation to an agent resident in Ontario: the power of attorney shall be under the seal of the corporation, and be signed by the president and secretary or other proper officers thereof in the presence of a witness, who shall make oath or affirmation as to the due execution thereof; and the official positions in the corporation held by the officers signing such power of attorney shall be sworn

o or affirmed by some person cognizant of the facts necessary in that behalf. R. S. O. 1887, c. 167, s. 53 (1); 55 V. c. 39, s. 14 (1).

(2) The power of attorney shall declare at what place in the Province the chief agency of the corporation is or is to be established, and shall expressly authorize such attorney to receive service of process in all actions and proceedings against the corporation in the Province for any liabilities incurred by the corporation therein, and also to receive from the Registrar all notices which the law requires to be given, or which it is thought advisable to give, and shall declare that service of process for or in respect of such liabilities, and receipt of such notices at such office or chief agency, or personally, on or by such attorney at the place where such chief agency is established, shall be legal and binding on the corporation to all intents and purposes whatsoever. 55 V. c. 39, s. 14 (2); R. S. O. 1887, c. 167, s. 53 (2).

(3) The power of attorney, duly executed, shall be filed by the Registrar in his office. 55 V. c. 39, s. 14 (3).

67.—Whenever the corporation changes its chief agent or chief agency in the Province, the corporation shall file with the Registrar a power of attorney as hereinbefore mentioned, containing any such change or changes in such respect, and containing a similar declaration as to service of process and notices as hereinbefore mentioned; and every corporation shall at the time of making the summary or annual statement hereinafter provided for, declare that, in its charter, act of incorporation, deed of settlement, or instrument of association, and in its constitution or rules made thereunder, no amendment or change has been made affecting its insurance contracts undertaken or to be undertaken; or if such change made, specifying clearly the change, and that no change has been made in the chief agent or chief agency without in either case such amendment or change having been duly notified to the Registrar. 55 V. c. 39, s. 16; R. S. O. 1887, c. 167, s. 53 (3).

68.—(1) After the power of attorney is filed as aforesaid, any process in any action or proceeding against the corporation for liabilities incurred in the Province may be validly served on the corporation at its chief agency, and all proceedings may be had thereon to judgment and execution in the same manner and with the same force and effect as in the proceedings in a civil action in the Province; Provided that nothing herein contained shall render invalid service in any other mode in which the corporation may be lawfully served. 55 V. c. 39, s. 17 (1); R. S. O. 1887, c. 167, s. 54 (1).

(2) If the power of attorney becomes invalid or ineffectual from any reason, or if other service cannot be effected, the Court or a Judge may order substitutional service of any process or proceeding to be made by such publication as is deemed requisite to be made in the premises, for at least three weeks, in at least one newspaper, and such publication shall be held to be due service upon the corporation of such process or proceeding. 55 V. c. 39, s. 17 (2).

(3) Where, at or after the 14th day of April, 1892, a friendly society having its head office elsewhere than in Ontario had or has in the charge, possession, custody or power of officers or agents, resident in Ontario, a reserve fund or funds for the security or assistance of members of the society, such fund or funds shall be deemed to be a fund held in trust for members in the jurisdiction of the said officers or agents, and the said officers or agents shall be deemed and shall continue to be trustees of the said fund or funds until other trustees thereof resident in Ontario are appointed by competent authority; and such trust fund or funds or as much thereof as from time to time remains unexpended shall be invested as enacted in section 92 of this Act. 55 V. c. 39, s. 17 (3).

69.—(1) On the Insurance Company Register, or on the Friendly Society Register, as the case may be, the Registrar shall cause to be entered the name of every corporation which from time to time he shall find legally entitled to registry, together with the date of the commencement of registry; also the term for which, in the

absence of suspension, revocation or cancellation, the registry is to endure ; which term shall begin as from the date of the said commencement and shall end not later than the 30th day of June then next ensuing, except in the case of the corporations mentioned in section 50 of this Act, and in the said excepted corporations the term of registry shall not exceed twelve months ; he shall also cause to be entered the place where the head office and the chief agency, if any, of the corporation are situated, and if there is a chief agency, the name and address of the chief agent ; also the kind of character of insurance for which the corporation is registered ; also if during the term the registry has been suspended, or revived, or revoked, or cancelled, the date and authority for such suspension, revivor, revocation or cancellation. 55 V. c. 39, s. 18 (1) ; 58 V. c. 34, s. 5 (3).

(2) To all corporations registered as above, the Registrar shall issue under his hand and the seal of his office a certificate of registry or of renewed registry, as the case may be, setting forth that it has been made to appear to him that the corporation is entitled to registry as an insurance company or friendly society (as the case may be) under this Act, and that the corporation is accordingly registered for the term and for the purposes stated in the certificate. 55 V. c. 39, s. 18 (2).

70.—(1) In the case of those corporations mentioned in section 50 of this Act, which receive from time to time a license or other document of authority under *The Insurance Act of Canada*, the corporation shall annually after its first registration hereunder present to the Registrar the then subsisting document of authority, within thirty days after the date thereof, and upon due presentation of the same, and upon payment to the Provincial Treasurer of the fee hereinafter prescribed, may be admitted to registry hereunder, or to renewal of registry, as the case may be, and in default of registry or of renewal of registry within the said thirty days, the corporation shall be deemed to be unregistered. 55 V. c. 39, s. 19 (1) ; 58 V. c. 34, s. 5 (4).

Provided that such presentation may be dispensed with on the Registrar receiving from the proper officer of the Dominion of Canada notice that such license or document of authority has in fact issued to the corporation named in the notice and authorizes the transaction of insurance of the kind and for the term specified in the notice. 55 V. c. 39, s. 19 (1).

(2) The suspension or cancellation or non-renewal of such document of authority issued under *The Insurance Act of Canada*, or issued by any Province of Canada to an insurance corporation standing registered in Ontario, shall in the respective cases operate *ipso facto* as a suspension or cancellation of registry under this Act, but registry so suspended may be revived as provided in this Act. 55 V. c. 39, s. 19 (2).

71.—In the case of all corporations other than those in the section 50 mentioned, any certificate of registry issued under this Act not being an interim or an extended certificate, shall, unless sooner suspended or cancelled, remain valid until the then next issuing thirtieth day of June inclusive, when, if the corporation has filed the summary statement required by section 91, and the annual statement prescribed in section 96, as the case may be, and also properly certified copies of all amendments to its constitution, laws, rules and regulations made since the next preceding summary or annual statement, and has otherwise complied with the law, the corporation shall be entitled to a certificate of renewed registry, and so on every succeeding thirtieth day of June thereafter. 55 V. c. 39, s. 20.

72.—Upon proof that a corporation has by accident or unavoidable cause been prevented from fully complying with the provisions of this Act within the time herein prescribed, and upon payment to the Provincial Treasurer of the fee hereinafter enacted, the Registrar may by writing under his hand and the seal of his office, grant for a time limited therein an interim certificate of registry, or may by such writing extend for a limited time the duration of a subsisting certificate of registry ; but in default in either case of renewal of registry before the expiry of the time so limited the corporation shall be deemed to be unregistered. 55 V. c. 39, s. 21.

73.—No corporation shall be registered under a name identical with that under which any other existing corporation is registered, or so nearly resembling such name as to be likely, nor shall be registered under any other name, likely in the opinion of the Registrar, to deceive the members or the public as to its identity; and no registered corporation shall be registered under a new or a different name except upon proof that such a new or different name is authorized by law. 55 V. c. 39, s. 23.

PROOF OF REGISTRY AND OF OTHER MATTERS: NOTICES UNDER THE ACT.

74.—(1) The Registrar shall cause to be published in the *Ontario Gazette*, in March of each year, a list of the corporations which stand registered at the date of the list: also if, in the interval between two published lists of registered corporations, a new corporation is registered, or the registry of any corporation is suspended or cancelled, or if a suspended registry is revived, he shall cause notice thereof to be published in the *Ontario Gazette*. 55 V. c. 39, s. 26 (1)

(2) A list or notice published in the *Ontario Gazette* over the name of the Registrar, shall, without further proof, be received in any Court and before all Justices of the Peace and others as *prima facie* evidence of the facts set forth in such published list or notice. 55 V. c. 39, s. 26 (2).

(3) All copies of returns, reports or other official publications of the Registrar purporting to be printed by the Printer to the Crown, or the Printer to the Legislative Assembly, or to be printed by order of the Legislative Assembly, shall, without further proof, be admitted as evidence of such publication and printing, and as true copies of the original documents delivered to be printed and published. 55 V. c. 39, s. 26 (3).

(4) The seal or signature of the Registrar shall be admissible in evidence without further proof of its authenticity; or of the official character of the person signing. 55 V. c. 39, s. 26 (4).

(5) A certificate under the hand of the Registrar and the seal of his office, that on a stated day the corporation or person mentioned therein stood registered, or did not stand registered within the meaning of this Act, or that the registry of any corporation or person was originally granted, or was renewed, or was suspended, or was revived, or was revoked, or was cancelled on a stated day, shall be *prima facie* evidence in any court or elsewhere of the facts alleged in the certificate. 55 V. c. 39, s. 26 (5).

(6) Every certificate of registry granted under this Act shall specify the first day, and also the last day of the term for which the corporation or person is registered; and the corporation or person so registered shall be deemed to be registered from the commencement of the first day to the end of the last day so specified. 55 Vic. c. 39, s. 25 (6).

(7) Copies of or extracts from any book, record, instrument or document in the office of the Registrar certified by him to be true copies or extracts and sealed with the seal of his office, shall be held to be authentic, and shall be *prima facie* evidence of the same legal effect as the original in any Court or elsewhere. R. S. O. 1887, c. 167, s. 150; 55 V. c. 39, s. 26 (7).

(8) For purposes of this section Registrar shall include the Deputy or Assistant Registrar. 55 V. c. 39, s. 26 (8).

(9) In the case of any document, by this Act or by any of the Acts mentioned in schedule hereto, required to be filed in the office of the Provincial Registrar, a certificate of filing shall be *prima facie* evidence of the filing if signed or purporting to be signed by the Deputy or Assistant Provincial Registrar, or by the acting Deputy or assistant. 58 V. c. 34, s. 5 (8).

(10) The books, accounts and documents of the corporation, and entries in the books of its officers or receiver or liquidator, are *prima facie* evidence of the matters to which the entries relate as against the corporation, or any of its branches, or

lodges, or as between any of the branches, lodges or their respective members, or as between contributories or alleged contributories. 56 V. c. 34, s. 5 (8).

(11) All by-laws of the corporation shall be reduced to writing, and shall have affixed thereto the common seal of the corporation, and any copy or extract therefrom, certified under the signature of the presiding officer, secretary or manager, shall be *prima facie* evidence in all civil Courts of Justice in Ontario of such by-laws or extracts from them, and that the same were duly made and are in force; and in any civil action or proceeding it shall not be necessary to give any evidence to prove the seal of the corporation, and documents purporting to be sealed with the seal of the corporation, attested by the presiding officer, secretary or manager thereof, shall be held *prima facie* to have been duly sealed with the seal of the corporation. R. S. O. 1887, c. 169, s. 75. See also 37 V. c. 50 (D.), s. 9.

75.—Subject to Statutory condition 23 of section 168, delivery of any written notice to any insurance corporation for any purpose of this Act, where the mode thereof is not otherwise expressly provided, may be by letter delivered at the chief office of the corporation in Ontario, or by registered post letter addressed to the corporation, its manager, or agent at such chief office, or by such written notice given in any other manner to an authorized agent of the corporation. 55 V. c. 39, s. 43.

SUSPENSION OR CANCELLATION OF REGISTRY: APPEALS.

76.—(1) The happening of any of the following events shall *ipso facto*, and, without notice from the Registrar, cancel the registry of the corporation concerned.

- (a) The repeal or the expiry without renewal of its charter, instrument of association, or deed of settlement, or of its Act or Acts of incorporation; or
- (b) The revocation of its corporate powers; or
- (c) The cancellation, or the expiry without renewal of license or other document of authority by which the corporation was authorized to exercise its corporate powers for the transaction of insurance; or
- (d) The passing of a resolution by the corporation for its winding up; or
- (e) The making of an order by any Court for the winding up of the corporation.

And upon proof that any of the said events has happened the Registrar, after notice to the corporation in cases where any dispute is likely to arise, shall cause the proper entry to be made upon the register. 55 V. c. 39, s. 49 (1).

(2) The happening of any of the following events shall *ipso facto*, and without notice from the Registrar, suspend the registry of the corporations concerned:—

- (a) The suspension of any of the Acts, instruments or documents mentioned in the first and third subdivisions of the next preceding subsection;
- Or (b) the suspension of the corporate powers of the corporation;

And upon proof that any of the said events has happened, the Registrar, after notice to the corporation in cases where any dispute is likely to arise, shall cause the proper entry to be made upon the register. 55 V. c. 39, s. 49 (2).

(3) Where the happening of any of the events in the two next preceding subsections mentioned is disputed by written notice delivered to the Registrar at his office, he shall decide both as to the facts and as to the law, and render his decision in writing, subject, however, to appeal as in section 78 enacted. 55 V. c. 39, s. 49 (3).

Provided nevertheless that notice of the happening of such event, if published by competent authority in the official *Gazette* of the Province, territory, Dominion, country or State by which the corporation was incorporated, licensed or empowered to transact insurance, or in the *Ontario Gazette*, or an official notice otherwise given by the Province, territory, Dominion, country or State to the Registrar shall be sufficient authority to the Registrar for the entries on the register hereinbefore mentioned. 55 V. c. 39, s. 49 (3).

(4) When any corporation incorporated by or in virtue of a statute of Ontario ceases to be registered the Registrar shall give a notice of the fact to the Master. 55 V. c. 39, s. 49 (4).

(5) In this section and subsequent sections "Master" shall mean the Master in Ordinary in the case of a corporation having its head office at Toronto or in the county of York; and in the case of a corporation having its head office in any other county, shall mean the Local Master, or the officer acting as Local Master in such county. 55 V. c. 39, s. 49 (5).

77.—(1) Where the Registrar decides in any disputed case that a corporation is or is not legally entitled to registry, or to renewal of registry, or where he suspends, revives or cancels the registry of a corporation, the Registrar, except as otherwise herein provided, shall render his decision in writing, and shall cause a copy of his decision, certified under the seal of his office to be delivered by registered post or otherwise to the corporation at its head office or chief agency in Ontario. 55 V. c. 39, s. 50 (1).

(2) A certified copy of any such decision of the Registrar may be had on application at his office, and upon payment to the Provincial Treasurer of the fee hereinafter prescribed. 55 V. c. 39, s. 50 (3).

(3) The affidavits and depositions received or taken by the Registrar in any disputed case shall be filed in his office. 55 V. c. 39, s. 50 (3).

(4) The evidence and proceedings in any matter before the Registrar may be reported by a stenographic writer who has taken an oath before the Registrar to faithfully report the same. 55 V. c. 39, s. 50 (4).

78.—(1) Upon the decision of the Registrar that the corporation is or is not entitled to registry, or upon any suspension, revivor or cancellation of registry by him, an appeal may be had to a Divisional Court of the High Court, the appellant having first given security for costs, in an amount to be determined by the Court or a Judge thereof, or by General Rules, as hereinafter provided for. Two clear days' previous notice of the application to fix the amount of such security shall be given to the Registrar at his office. 55 V. c. 39, s. 51 (1).

(2) No appeal shall be allowed unless notice thereof in writing is given to the Registrar within one month after the judgment complained of; nor unless, within two months after the judgment complained of, the appellant gives proper security as aforesaid that he will effectually prosecute his appeal and pay such costs and damages as may be awarded in case the judgment appealed from is in whole or in part affirmed. At least ten days' notice of any subsequent proceeding on the appeal shall be given in writing to the Registrar at his office. 56 V. c. 32, s. 10 (51); 58 V. c. 34, s. 6 (9).

(3) Upon the production of final judgment, on appeal, if any, admitting the corporation to registry, or disallowing registry granted, or reversing the suspension, revivor or cancellation of registry, the Registrar shall cause the proper entry to be made on the register together with a minute of the judgment authorizing such entry, and the Registrar shall thereupon grant a certificate of registry or cancel the registry granted according to the tenor of such judgment. 55 V. c. 39, s. 51 (3).

(4) The Judges of the Supreme Court of Judicature named in section 135 of *The Judicature Act, 1895*, may make rules or orders as to the form of appeals under this section and the trying thereof and otherwise relating thereto. 55 V. c. 39, s. 51 (4).

79.—(1) Upon proof that any registry or certificate of registry has been obtained by fraud or mistake, or that a corporation exists for an illegal purpose, is insolvent or is on the verge of insolvency, or has, in terms of sections 80 and 81, made default of payment, or has wilfully, and after notice from the Registrar, contravened any of the provisions of this Act, or has ceased to exist, the registry of the corporation may be suspended or cancelled by the Registrar; but such suspension or cancellation shall be appealable as hereinafter provided. 55 V. c. 39, s. 25 (1); 56 V. c. 32, s. 10 (8).

(2) On the suspension or cancellation of the registry of any corporation, except as herein otherwise enacted, the Registrar shall, by registered post or otherwise, cause notice thereof in writing under his hand to be delivered to the head office or chief agency of the corporation in Ontario; and from the date of such delivery the corporation shall be deemed to be unregistered, but, in the case of suspension of registry only whilst such suspension lasts; and from and after such delivery the corporation shall withdraw every offer to undertake contracts, and shall absolutely cease to undertake contracts, but without prejudice to any liability actually incurred by such corporation which may be enforced against the same as if such suspension or cancellation had not taken place. 56 V. c. 39, s. 25 (2).

80.—Every lawful claim against an insurance corporation under any contract within the meaning of section 2 shall become legally payable on the expiration of sixty days after reasonably sufficient proof has been furnished to the corporation of the happening of the event on which such claim was by said contract to accrue, and, where property was insured, after like proof of such additional matters as the law requires; and any rules, conditions, or stipulations to the contrary shall as against the assured be void; but the insurance corporation may in its discretion pay the claim at any time before the expiration of the sixty days. 55 V. c. 39, s. 42; R. S. O. 1887, c. 167, s. 114.

81.—(1) Any insurance corporation shall be liable to have its registry suspended by the Registrar upon the failure of the corporation to pay an undisputed claim, or an insurance contract for the space of sixty days after being legally payable, or if disputed, after final judgment and tender of a legal valid discharge, and (in either case) after notice supported by affidavit of the corporation's default delivered to the Registrar. 55 V. c. 39, s. 44 (1); 58 V. c. 34, s. 6 (6).

(2) Where the registry of a corporation has been suspended under the preceding sub-section, but the corporation within sixty days after the notice therein provided has fully paid all undisputed claims and final judgments upon or against the corporation, the Registrar, upon proof of the facts, may revive the registry of the corporation and issue his certificate of such revivor. 55 V. c. 39, s. 44 (2); 58 V. c. 34, s. 6 (7).

(3) If within the sixty days mentioned in the next preceding sub-section, the corporation has not fully paid all undisputed claims and final judgments, the Registrar, upon proof of the fact, shall cancel the registry of the corporation. 55 V. c. 39, s. 44 (3).

(4) If the enactment under or by virtue of which the corporation was incorporated, or by which the contracts of the corporation are regulated, prescribes payment of undisputed claims and final judgments within less than sixty days, this section shall not be deemed to extend the time so prescribed for payment, nor to extend the right of the corporation to revivor of registry hereunder beyond the time limited by the said enactment. 55 V. c. 39, s. 44 (4).

82.—The Registrar, or any person authorized under his hand and seal, shall have at any time within reasonable business hours of every day, except Sundays and holidays, access to all such books, securities, and documents of a corporation as relate to the corporation's contracts; and any officer or person in charge, possession, custody or control of such books, securities or papers refusing or neglecting to afford such access, shall be guilty of an offence, punishable as for an offence against section 85, and, if registered, the corporation shall be liable to have its registry suspended; and, on continued refusal or neglect to afford such access, shall be liable to have its registry cancelled. 55 V. c. 39, s. 45; 58 V. c. 34, s. 6 (8).

83.—(1) If it is established to the satisfaction of the Registrar that the accounts of any corporation (including therein any body registered under this Act) have been materially and wilfully falsified, or that for eighteen consecutive months there has

been no *bona fide* audit of the books and accounts ; or if there is filed in the office of the Registrar a requisition for audit bearing the signatures, addresses and occupations of at least twenty-five persons being members of the corporation or claimants or persons entitled to claim or having insurable interest under contracts of the corporation, and such requisition alleges in a sufficiently particular manner to the satisfaction of the Registrar, specific fraudulent or illegal acts, or repudiation of contracts or insolvency, the Registrar may nominate a competent accountant, who shall, under the directions of the Registrar, make a special audit of the books and accounts and report thereupon to the Registrar in writing, verified upon oath. 55 V. c. 39, s. 30 (1) ; 58 V. c. 34, s. 5 (10).

(2) For purposes of this Act a special auditor shall be sufficiently accredited, if he deliver to the secretary or to any officer of such corporation, a written statement under the hand and seal of the Registrar, to the effect that the Registrar has nominated such auditor to audit the books and accounts. 55 V. c. 39, s. 30 (2) ; 58 V. c. 34, s. 5 (10).

(3) The expense of such special audit shall be borne by such corporation, and the auditor's account therefor, when approved in writing by the Registrar, shall be conclusive and shall be payable by the corporation forthwith. 55 V. c. 39, s. 30 (3) ; 58 V. c. 34, s. 5 (10).

Provided nevertheless that where an audit is requested as in sub-section 1, the persons so requesting it shall, together with their requisition, deposit with the Registrar proper security for the costs of the audit in a sum not exceeding \$200 as he shall determine ; and where the facts alleged in the requisition appear to the Registrar to have been partly or wholly disproved by the audit, he may pay the costs thereof partly or wholly out of the deposit. 55 V. c. 39, s. 30 (3) ; 58 V. c. 34, s. 5 (10).

(4) All books, securities, vouchers and documents relating to the contracts or funds of the corporation (or of the registered branch or lodge undertaking contracts) shall be deemed to be included in the audit prescribed by this section. 55 V. c. 39, s. 30 (4) ; 58 V. c. 32, s. 10 (9) ; 58 V. c. 34, s. 5 (10).

(5) When any corporation within the meaning of sub-section 1 through any trustee, officer, employee, agent or auditor having in his custody, possession or power, its funds, books or vouchers, refuses to have the same duly audited as provided by section 90, and by this section, or obstructs an auditor in the performance of his duties, the Registrar upon proof of the fact may suspend or cancel the registry of such corporation ; but such suspension or cancellation shall be appealable as hereinbefore provided. 55 V. c. 39, s. 30 (6) ; 58 V. c. 34, s. 5 (10).

(6) Every trustee, director, officer, manager, agent, collector, auditor or employee of the corporation, or of any branch or lodge whatsoever of the corporation, who knowingly makes or publishes, or assists to make or publish, any wilfully false statement of its financial affairs, or who makes or assists to make any untrue entry in any book of record, entry or account, or who refuses or neglects to make any proper entry therein, or to exhibit the books, vouchers, securities and documents, or to allow the same to be inspected or audited either for the general purposes of the corporation or for the purposes of this Act, and extracts to be taken therefrom, shall be guilty of an offense, and upon summary conviction thereof before any Police Magistrate or Justice of the Peace having jurisdiction where the offence was committed, shall be imprisoned in the Central Prison, or in any goal of the Province, with or without hard labour, for a period not exceeding twelve months. 55 V. 39, s. 30 (5).

84.—(1) If the report made by the special auditor appears to the Registrar to disclose fraudulent or illegal acts on the part of such corporation as mentioned in sub-section 1 of section 83, or a repudiation of its contracts, or insolvency, the Registrar shall notify the corporation accordingly, and furnish it with a copy of the special auditor's report, allowing two weeks for a statement to be filed with the Registrar in reply. 58 V. c. 39, s. 31 (1) ; 58 V. c. 34, s. 5 (10).

(2) Upon consideration of the special auditor's report and of the statement of such corporation, in reply, and of such further evidence, documentary or oral, as he may require, the Registrar shall render his decision in writing, and may thereby continue, or suspend, or cancel the registry of the corporation; but such decision shall be appealable, as hereinbefore provided. 55 V. c. 30, s. 31 (2); 58 V. c. 34, s. 5 (10).

(3) The evidence may be given under oath, which oath the Registrar may administer. 55 V. c. 30, s. 31, (3); 58 V. c. 34, s. 5 (10).

UNREGISTERED CORPORATIONS DISQUALIFIED; ASSESSMENT INSURANCE;
PENALTIES.

85.—(1) After the 31st day of December, 1892, no person or persons, or body corporate or unincorporated, other than a corporation standing registered under this Act and person duly authorized by law and by such registered corporation to act in its behalf, shall undertake or effect, or offer to undertake or effect any contract of insurance. 55 V. c. 30, s. 27 (1); 58 V. c. 34, s. 5 (9).

(2) If any promoter, organizer, office-bearer, manager, director, officer, collector, agent, employee, or person whatsoever, other than as enacted in the next preceding subsection, undertakes or effects, or agrees or offers to undertake or effect any contract of insurance, he shall be guilty of an offence, and upon summary conviction thereof before any Police Magistrate or Justice of the Peace having jurisdiction where the offence was committed, shall be liable to a penalty not exceeding \$200 and costs, and not less than \$20 and costs, and in default of payment the offender shall be imprisoned with or without hard labor for a term not exceeding twelve months and not less than three months. 55 V. c. 30, s. 27 (2).

(3) In any trial or cause or proceeding under this Act the burden of proving registry shall be upon the corporation or person charged. 55 V. c. 30, s. 27 (5).

(4) Every application, contract, or other instrument of such insurance, and every circular, advertisement or publication soliciting insurance issued or used in Ontario for purposes of assessment insurance shall bear the words "Assessment System" printed or stamped in large type at the head thereof; any contravention of this subsection shall constitute an offence and shall be punishable as for an offence against sub-section 2 of this section. 55 V. c. 30, s. 2 (14).

(5) Any one may be prosecutor or complainant under this Act; and one-half of any fine imposed by virtue of this Act shall, when received, belong to Her Majesty for the use of the Province, and the other half shall belong to the prosecutor or complainant. 55 V. c. 30, s. 27 (3).

(6) Any person convicted under this Act who gives notice of appeal against the decision of the convicting justice shall be required before being released from custody to give to the justice satisfactory security for the amount of the penalty, costs of conviction, and appeal, and the appeal shall be to a Divisional Court of the High Court. 55 V. c. 30, s. 27 (4); 58 V. c. 34, s. 5 (9).

(7) All information or complaints for the prosecution of offences under this Act shall be laid or made in writing within one year after the commission of the offence. 55 V. c. 30, s. 27 (6).

86.—Every offence committed by a corporation, or by the insurance branch of a corporation against this Act shall be deemed to have been also committed by every officer of the same bound by virtue of his office or otherwise to fulfil any duty whereof such offence is a breach, or if there be no such officer, then by every member of the committee of management of the same, unless such member be proved to have been ignorant of his duty, or to have attempted to prevent the commission of such offence; and every default under this Act constituting an offence constitutes, if continued, a new offence in every week during which the default continues. 55 V. c. 30, s. 60.

BOOKS : PERIODICAL AUDIT : INVESTMENTS : FINANCIAL STATEMENTS.

(For special audit see section 83).

87.—Every registered corporation except the corporations mentioned in sub-sections 1 and 2 of section 50, shall keep such a classification of its contracts, and such register and books of account as may from time to time be directed or authorized by the Registrar; and if it appears at any time to him that such books are not kept in such business-like way as to make at any time a proper showing of the affairs and standing of the corporation, he shall thereupon nominate a competent accountant to proceed, under his directions, to audit such books and to give such instructions as will enable the officers of the corporation to keep them correctly thereafter; the expense of the accountant shall be borne by the corporation to which he is sent, and shall not exceed \$5 per day and necessary travelling expenses; and the account for such audit and instructions shall, when approved under the hand of the Registrar, be payable by the corporation forthwith. 55 V. c. 39, s. 28 (1).

88.—Where the corporation has a share or stock capital, the books required by section 87 to be kept shall include a stock register, in which a register of the transfers of stock shall be accurately kept, and it shall at all reasonable times be open to the examination of any shareholder and the Registrar. The entries in such register shall include the following particulars: the register numbers of the shares transferred; the amount of subscribed stock transferred; the amount heretofore paid up on such stock; the names and addresses of the transferor and the transferee; the date of the transfer and the date of confirmation or disallowance by the board. R. S. O. 1887, c. 167, s. 101.

89.—In the case of insurance companies required to make deposit with the Province there shall be kept a policy register recording separately the contracts for which the said deposit is answerable under section 48. R. S. O. 1887, c. 167, s. 102.

90.—(1) It shall be the duty of the officers of every registered insurance corporation to have at least once in every year a bona fide and business-like audit of its books of record and account by at least two competent auditors.

(2) In Provincial corporations every auditor shall be a qualified accountant, not holding, nor having, for at least two years prior to his becoming auditor, held any other office or employment under the corporation; and an auditor need not be a member of the corporation.

Provided that the directors or executive officers may for incapacity, misconduct or negligence, on a two-thirds majority, suspend any auditor, such suspension to remain in force until the next general meeting of the corporation.

Provided also, that if any auditorship becomes vacant between the general meetings of the corporation the board of directors or the executive officers may fill the vacancy until the next general meeting. 55 V. c. 39, s. 29.

(3) In Provincial companies the auditors shall be annually chosen, and their remuneration determined by members in general meeting assembled.

91.—Every Provincial corporation shall furnish to each member annually a summary statement showing as the result of such audit or audits the corporation's actual assets, liabilities, receipts and expenditures, and the state of the insurance fund or funds, and a copy of such summary statement signed and certified by the auditors shall be filed in the office of the Registrar with the statement required by section 90. 55 V. c. 39, s. 29.

Provided that a registered friendly society, instead of furnishing such summary statement to each member individually, may deliver to each lodge or local branch, for the information and use of the members thereof, at least ten copies of the summary statement; of which also at least one copy shall be kept posted up in a place accessible and convenient to the members generally, there to remain posted until at

least one month after the posting of the next succeeding statement; also one copy of the said summary statement shall be kept on record and shall be made accessible to the members generally. 55 V. c. 39, s. 29 (1).

Provided also that if the society has an official newspaper or journal, and a copy of the same is sent to each member, publication of the summary statement therein shall be sufficient.

92.—(1) The surplus insurance funds of a Provincial corporation, or branch or lodge thereof shall in the name of the corporation, branch or lodge be invested in securities which are a first charge on land held in fee simple or shall be invested in the public securities of Canada or of any of the Provinces of Canada, or (such securities being in other respects reasonable and proper) in terminating debentures of any municipal corporation, or in the terminating debentures of any society or company incorporated under the Revised Statute respecting Building Societies; or in terminating debentures of any society, or company in which under the law of the Province trustees may invest trust funds; or shall remain deposited (whether with or without interest) in the name of the corporation in a post office savings bank or in any chartered bank of Canada, or in any building society or loan company in Ontario by any Act of Ontario, or of the Dominion of Canada duly authorized to receive deposits. 55 V. c. 39, s. 29 (2). R. S. O. 1887, c. 167, s. 93.

Provided that where the constitution or rules of the corporation, branch or lodge prescribe the securities in which the funds of the corporation, branch or lodge shall be invested nothing herein contained shall be deemed to enlarge the power of investment by the said constitution or rules conferred.

(2) Subject to the by-laws or constitution any corporation standing registered under this Act, or any branch or lodge thereof, may hold absolutely to its own use and benefit such real estate as is necessary for the accommodation of the corporation, branch or lodge in relation to the transaction of its business, and such real estate as being mortgaged or hypothecated to it, is acquired by it for the protection of its investments, and may from time to time, sell, mortgage, lease or otherwise dispose of the same; but the corporation, branch or lodge shall sell any real estate acquired in satisfaction of any debt within seven years after it has been so acquired, otherwise it shall be forfeited to Her Majesty for the uses of the Province. R. S. O. 1887, c. 167, s. 95.

(3) No insurance corporation, or branch or lodge thereof, shall contract with any of its auditors, trustees, directors, or executive officers for any loan or credit, or borrowing of money, and every such attempted loan or borrowing is hereby absolutely prohibited. 55 V. c. 39, s. 29 (3) as added by 58 V. c. 34, s. 5 (10). R. S. O. 1889, c. 167, s. 96.

(4) Where, in any insurance corporation or branch or lodge thereof, (if organized with branches or lodges), the trustees, directors or managing board (by whatever name known) or the executive or managing committee make such an investment of any of the corporation's money as is not authorized by law, or where the board or committee lend any of the corporation's money, or transfer the beneficial ownership in any of the corporation's property or assets to any member of the board or committee, or to any auditor, trustee, director, or executive officer of the corporation, all the members of the board or committee (as the case may be) who voted in favor of or assented to the said investment or loan or transfer shall as for a breach of trust be personally liable jointly and severally to repay or restore (as may be directed) the money, property or assets so invested or loaned or transferred, together with interest, and also with costs, if the Court shall so determine. Actions may at any time be brought by any member of the corporation in the name of himself and his fellow-members generally without designating his fellow-members individually; and all trustees, directors or members of the board or committee may be made defendants, and the proof shall be on any such defendant that he did not vote for or assent to the said investment, loan or transfer. If, in the opinion of the Court, the plaintiff

has proved the investment or loan or transfer illegal, he shall be entitled to his costs out of the funds of the corporation; and the corporation, or the receiver or estate thereof, shall have the right to recover over against the defendants personally or from such of them as the Court may determine. 55 V. c. 39, s. 29 (4); 58 V. c. 34, s. 5 (10).

93.—Every officer or other person appointed or elected to any office in anywise concerning the receipt, safe-keeping or proper application of money shall furnish security to the satisfaction of the directors for the just and faithful execution of the duties of his office according to the rules of the corporation, and any person entrusted with the performance of any other service may be required by the directors to furnish similar security, and the securities so furnished and then subsisting shall be produced to the auditors as part of the annual audit hereinbefore prescribed. In the case of Provincial insurance companies the security given by the treasurer or other officer having charge of the money of the company shall in no case be less than \$2,000. R. S. O. 1887, c. 167, s. 97: cf. c. 169, s. 20.

94.—All real and personal estate, moneys, property and effects, and all titles, securities, instruments and evidences, and all rights and claims of or belonging to the corporation, branch or lodge shall be vested in the corporation, branch or lodge. The books used by any auditor, officer, collector or agent for verifying or for recording moneys received for the corporation, branch or lodge shall be the property of the corporation, branch or lodge; nor shall the foregoing persons or any solicitor, counsel or other person whatsoever have in these or in any other of the books of account or record of the corporation any ownership or proprietary right, or any right of lien whatsoever; and any person who in contravention of this section, withdraws, withholds or detains any of the said books from the possession or control of the directors, or executive officers, or from the receiver or liquidator of the corporation, branch or lodge shall be guilty of an offence and the procedure and penalty shall be as in the case of an offence against section 85 of this Act. 55 V. c. 39, s. 30 (4); 56 V. c. 33, s. 10 (9); 58 V. c. 34, s. 5 (10); Imp. 38-9 c. 60, s. 16.

95.—If a person appointed or elected to an office and being entrusted with and having in his possession books, moneys, securities, documents or other property or effects belonging to the corporation, branch or lodge, or relating thereto, dies, resigns, vacates, or becomes incapacitated by mental or physical debility, or becomes bankrupt or insolvent, his legal representative or other person or persons having them in possession or custody, shall within fifteen days after the decease or the resignation, incapacity or the bankruptcy or insolvency, deliver all such property and effects belonging to the corporation branch or lodge to such person or persons as the directors or executive officers appoint. Cf. R. S. O., 1887, c. 169, s. 40.

96.—(1) It shall be the duty of the presiding officer, the secretary and the treasurer of every registered insurance corporation except those mentioned in sub-sections 1 and 2 of section 59, to prepare and file annually with the Registrar as prescribed by sub-sections (3 and 4) of this section, according to a printed form to be supplied on application, a sworn statement of the financial condition and affairs of the corporation for the purposes of this Act; and any corporation refusing or neglecting to file the statement by this section required, or to make prompt and explicit answer to any enquiries at any time put by the Registrar touching the corporation's contracts or finances shall be liable to suspension or cancellation of registry. 55 V. c. 39, s. 47 (1); 56 V. c. 32, s. 10 (14).

Provided a friendly society may include in its annual statement to the Registrar a valuation, made by a competent actuary, and verified by his oath, of any or all of the contingent liabilities of the society; and the Registrar may in his annual report publish an abstract of such valuation as part of the statement. 55 V. c. 39, s. 22 (1).

(2) The statement required by the preceding subsection may be sworn to before

the Registrar or Assistant Registrar, or any Justice of the Peace, Notary Public or Commissioner of the High Court for taking affidavits, and every such person is hereby authorized to administer any oath required under this Act, for purposes of any document required or permitted to be filed by this Act. 55 V. c. 39, s. 47 (2).

(3) In the case of Provincial licensees registered on the Insurance Company Register, the statement mentioned in section 1 shall be prepared annually on the first day of January, or within one month thereafter, and shall be filed with the Registrar on or before the first day of February then next ensuing.

(4) In the case of corporations registered on the Friendly Society Register, the statement mentioned in subsection 1 shall be prepared annually on the first day of January or within one month thereafter, and shall be filed with the Registrar on or before the first day of March then next ensuing.

(5) Together with the statement mentioned in subsection 1, the corporation shall file with the Registrar a certified copy of the summary statement required by section 61. 55 V. c. 39, s. 47 (3).

97.—(1) From the statements filed with him as aforesaid, the Registrar shall each year cause to be prepared, printed and distributed, a report for the official year ending 31st December, and such report shall include a list of registered insurance corporations brought up to its actual date of publication.

(2) The Registrar shall not in any initial or renewal certificate of registry, or other publication, or otherwise vouch for the financial basis, or for the actual or actuarial solvency or standing of any insurance corporation; nor shall the printing of a corporation's annual statement in the Registrar's report operate or be anywise construed as a warranty of such basis, or of such solvency or standing. 55 V. c. 39, s. 22 (1).

POWERS OF DIRECTORS—GENERAL PROVISIONS.

(All Provincial Insurance Companies.)

98.—Sections 99 to 105 inclusive shall apply to all Provincial corporations registered on the Insurance Company Register. R. S. O. 1887, c. 167, s. 88.

99.—The board of directors may from time to time appoint a manager, secretary, treasurer, and such other officers, agents or assistants as to them seem necessary; prescribe their duties, fix their compensations or allowances; take such security from them as is required by this Act for the faithful performance of their respective duties, and remove them and appoint others instead. The board may also, subject to the provisions of this Act, adopt a table of rates, premiums or premium notes, as the case may be, and vary such table from time to time, and determine the amount of the contract to be undertaken; they may hold their meetings monthly, or oftener if necessary, for transacting the business of the corporation, and they shall keep a record of their proceedings in a book to be known as the Minute Book of the corporation, wherein shall also be entered the transactions of all general meetings of the corporation. R. S. O. 1887, c. 167, s. 89.

100.—(1) The board may from time to time make and prescribe such by-laws as to them appear needful and proper respecting the funds and property of the company, the duty of the officers, agents and assistants thereof, the effectual carrying out of the objects contemplated by this Act, the holding of the annual meeting, and all such other matters as appertain to the business of the company, and are not contrary to law, and may from time to time alter and amend the said by-laws, except in cases with regard to which it is provided that any such by-laws shall not be repealed, or where the repeal would affect the rights of others than the members of the company, in any of which cases such by-law shall not be repealed. R. S. O. 1887, c. 167, s. 90 (1).

(2) Every by-law of the board shall be duly entered in the minute book, and unless

and until amended or annulled by the board, or by a general meeting of the members, shall be deemed to be a by-law of the company. Cf. R. S. O. 1887, c. 167, s. 90 (2).

(3) There shall be filed with the Insurance Registrar copies of all by-laws that may from time to time be passed by the company or the board. R. S. O. 1887, c. 167, s. 90 (3).

101.—The board shall superintend and have the management of the funds and property of the company, and of all matters relating thereto, and not otherwise provided for. R. S. O. 1887, c. 167, s. 91.

102.—The board may make arrangements with any other company registered to transact business in the Province for the re-insurance of risks, on such conditions with respect to the payment of premiums thereon as may be agreed between them. R. S. O. 1887, c. 167, s. 92.

103.—(1) The board may issue debentures or promissory notes in favor of any person, firm, building society, banking or other company, for the loan of money, and may borrow money therefrom on such debentures or promissory notes for any term not exceeding twelve months, and on such conditions as they think proper, and may renew the same from time to time for any such term, the whole of the assets, including premium notes of the company, being held liable to pay the same at maturity, but no such debenture or promissory note shall be for a less sum than \$100. R. S. O. 1887, c. 167, s. 94 (1).

(2) All the debentures and promissory notes at any one time outstanding shall not exceed one-fourth of the amount remaining unpaid upon the same premium notes. R. S. O. 1887, c. 167, s. 94 (2).

104.—The treasurer of the company or other officer having charge of the money of the company shall give security to the satisfaction of the board of directors in a sum of not less than \$2,000 for the faithful discharge of his duties. R. S. O. 1887, c. 167, s. 97.

105.—At any annual meeting of the members or shareholders of a company, or at any special general meeting thereof, if such purpose was clearly expressed in the notice of the special general meeting, it shall be lawful to enact by-laws or pass resolutions for the remuneration of the directors of the company, and copies of such by-laws or resolutions shall, within one week after their passing, be filed with the Insurance Registrar. 46 V. c. 15, s. 2; R. S. O. 1887, c. 167, s. 98.

MUTUAL AND CASH-MUTUAL FIRE INSURANCE COMPANIES : THEIR INTERNAL MANAGEMENT.

106.—Sections 107 to 141 inclusive, shall apply only to mutual and cash-mutual fire insurance companies. R. S. O. 1887, c. 167, s. 64.

1. Admission and withdrawal of members.

107.—The company may insure on the premium note plan any property within the scope of the company's license, and the maker of the premium note shall as from the date of the acceptance of the risk by the company be a member of the company, and shall be entitled to the like rights, and be subject to the like liabilities as other members of the company. Cf. R. S. O. 1887, c. 167, s. 65.

108.—In a cash-mutual company the premium note shall, subject to section 111, be liable for claims arising against the company generally. R. S. O. 1887, c. 167, s. 66.

109.—No member of the company shall be liable in respect of any loss or other claim or demand against the company, otherwise than upon and to the extent of the amount unpaid upon his premium note or undertaking. R. S. O. 1887, c. 167, s. 67.

110.—Any member of the company may, with the consent of the directors, withdraw therefrom upon such terms as the directors may lawfully require. R. S. S. 1887, c. 167, s. 68.

111.—The party insured shall, if insured against fire on the premium note plan, be liable to pay his proportion of the losses, expenses and reserve of the company to the time of cancelling the policy, and on payment of his proportion of all assessments then payable and to become payable in respect of losses and expenses, and reserve up to such period, shall be entitled to a return of his premium note or undertaking. R. S. O. 1887, c. 167, s. 113, s. 124.

2. General Meetings.—(*Mutual and Cash-Mutual Fire Insurance Companies.*)

112.—A meeting of the members for the election of directors shall be held in every year, within two months after the thirty-first day of December in each year, at such time and place as may be prescribed by the by-laws of the company. R. S. O. 1887, c. 167, s. 69.

113.—At annual meetings prior to the election of directors the statement mentioned in section 91 for the year ending on the previous thirty-first day of December, shall be presented and read. R. S. O. 1887, c. 167, s. 70.

114.—Notice of any annual or special meeting of the members of the company shall be published in one or more newspapers for at least two weeks previous to the day of the meeting, and the board of directors may convene at any time a general meeting of the company upon any urgent occasion, giving notice thereof as herein provided. R. S. O. 1887, c. 167, s. 71.

115.—(1) Each member of the company shall be entitled at all meetings of the company, to the number of votes proportioned to the amount of insurance by him held, according to the following scale, that is to say, for any sum under \$1,500, one vote; from \$1,500 to \$3,000, two votes; from \$3,000 to \$6,000, three votes; and one vote for every additional \$3,000; but no member shall be entitled to vote while in arrear for any assessment or instalment or fixed payment due by him to the company. R. S. O. 1887, c. 167, s. 72.

(2) Where a policy on the premium note plan is made to two or more persons, the person whose name stands first on the register of policy-holders, and no other, shall be entitled to vote. 55 V. c. 39, s. 63 (1) part.

116.—No applicant for insurance shall be competent to vote or otherwise take part in the company's proceedings until his application has been accepted by the board of directors. R. S. O. 1887, c. 167, s. 73.

3. Directors, Qualification, Election, etc.—(*Mutual and Cash-Mutual Fire Insurance Companies.*)

117.—The directors shall be members of the company and insured therein, for the time they hold office, to the amount of \$800 at least, and, where the company has a share capital, two-thirds of the directors shall have the further qualification mentioned in section 26 of this Act. R. S. O. 1887, c. 168, s. 74.

118.—(1) The board of directors shall consist of six, nine, twelve or fifteen directors, as shall be determined by resolution passed at the meeting held under section 13, or at an annual meeting of the company, or at a special general meeting called for the purpose of such determination and election. R. S. O. 1887, c. 167, s. 75 (1).

(2) The number of directors constituting such board may from time to time be increased or decreased, if so decided at a special general meeting of the company

called for the purpose, or at an annual meeting, if notice in writing of the intention to move a resolution for that purpose at such annual meeting is given to the secretary of the company at least one month before the holding of the meeting; but the increased or decreased number of directors shall in any such case be six, nine, twelve or fifteen as aforesaid. R. S. O. 1887, c. 167, s. 75 (2).

119.—A copy of the resolution specified in the last preceding section, together with a list of the directors elected thereunder, both documents being duly certified under the hands of the chairman and secretary of the annual meeting or special general meeting aforesaid, shall be filed in the office of the Insurance Registrar. R. S. O. 1887, c. 167, s. 76.

120.—Of the directors elected, as hereinbefore provided, one-third shall retire annually in rotation, and at the first meeting of the directors, or as soon thereafter as possible, it shall be determined by lot which of them shall hold office for one, two or three years respectively, and the determination shall be entered of record as part of the minutes of the said first meeting. R. S. O. 1887, c. 167, s. 77.

121.—At every annual meeting of the company thereafter, one-third of the total number of directors shall be elected for a period of three years, to fill the places of the retiring members, who shall be eligible for re-election. R. S. O. 1887, c. 167, s. 78.

122.—The manager of the company may be a director of the company, and may be paid an annual salary, under a by-law passed as enacted in section 105. R. S. O. 1887, c. 167, s. 79.

123.—No agent, or paid officer, or the banker of the company, or person in the employment of the company, other than the manager, shall be eligible to be elected as a director, or shall be allowed to interfere in the election of directors for the company. Provided nothing herein contained shall prevent a director from receiving applications for insurance, or from taking to his own use the customary application, survey, or policy fee, but the said fee shall not exceed \$1.50 for any one application or policy. R. S. O. 1887, c. 167, s. 80; 56 V. c. 32, s. 9 (4).

124. —(1) The election of directors shall be held and made by such members of the company as attend for that purpose in their proper persons. R. S. O. 1887, c. 167, s. 81.

(2) The election of directors shall be by ballot. R. S. O. 1887, c. 167, s. 82.

(3) If at any such election two or more members have an equal number of votes, in such manner that a less number of persons than the whole number to be elected appear to have been chosen directors by a majority of votes, then the said members of the company shall proceed to elect by ballot, until it is determined which of the persons so having an equal number of votes shall be the director or directors, so as to complete the whole number of directors to be elected, and the directors shall at their first meeting after any such election, proceed to elect by ballot, among themselves, a president and vice-president, and at such election the secretary shall preside. R. S. O. 1887, c. 167, s. 83.

(4) In case an election of directors is not made on the day on which it ought to have been made, the company shall not for that cause be dissolved, but the election may be held on a subsequent day, at a meeting to be called by the directors, or as otherwise provided by the by-laws of the company, and in such case the directors shall continue to hold office until their successors are elected. R. S. O. 1887, c. 167, s. 85.

125.—If a vacancy happens among the directors during the term for which they have been elected, by death, resignation, ceasing to have the necessary qualification under section 117 of this Act, insolvency, or by being absent without

previous leave of the board, from the board for three regular meetings in succession, (which shall, *ipso facto*, create such vacancy) the vacancy, in the case of a board limited to six directors, shall be filled up, and in the case of a board limited to a number of directors exceeding six, may be filled up, until the next annual meeting, by any person duly qualified, to be nominated by a majority of the remaining directors, and as soon as may be after the vacancy occurs, and at the next annual meeting the vacancy shall be filled for the portion of the term still unexpired. R. S. O. 1887, c. 167, s. 84.

126.—(1) Three directors shall constitute a quorum for the transaction of business, and in the case of an equality of votes at any meeting of the board, the question shall pass in the negative. R. S. O. 1887, c. 167, s. 86.

(2) A director disagreeing with the majority of the board at a meeting, may have his dissent recorded, with his reasons therefor. R. S. O. 1887, c. 167, s. 87.

4. Premium Notes and Assessments. (Mutual and Cash-Mutual Fire Insurance Companies.)

127.—(1) The company may accept the premium note or the undertaking of the assured for assurance, and may undertake contracts in consideration thereof, said notes or undertakings to be assessed for the losses, expenses and reserve of the company in the manner hereinafter provided. R. S. O. 1887, c. 168, s. 122.

(2) Where the premium note or undertaking is made upon a sheet or page which contains other matter, the premium note or undertaking shall be so entitled in conspicuous type, and shall be separated from such other matter by a blank space of at least an inch wide carried across the sheet or page, and if such other matter requires, or is intended to receive the assent of the maker of the premium note or undertaking, such assent shall be evidenced by a signature wholly distinct from the signature to the premium note or undertaking, and any violation of this section shall render the premium note or undertaking absolutely null and void; but the notice required by section 138 of this Act to be embodied in or endorsed upon the premium note shall not be deemed to be "other matter" within the meaning of this sub-section. 53 V. c. 44, s. 1, 56 V. c. 32, s. 9, (2).

128. The rate to be charged or taken by way of premium note for insuring first-class isolated non-hazardous property shall not be less than one dollar per one hundred dollars per annum, and the minimum rate of insurance upon other property shall be increased relatively with the increased risk, according to the nature of such property, provided that premium notes of not less than \$1 per \$100 per annum may be charged or taken when and so long as the gross amount at risk exceeds \$2,000,000, and the total assets of the company do not fall below two per centum of the gross amount at risk, or so long as the company keeps on deposit with the Provincial Treasurer the full amount required of new companies licensed after the commencement of this Act. R. S. O. 1887, c. 167, s. 109.

129.—(1) The directors may demand in cash a part or first payment of the premium, or premium note or undertaking at the time that application for insurance is made, and such first payment shall be credited upon said premium note or undertaking or against future assessments, but not more than sixty per centum of any premium or premium note or undertaking shall be paid in cash at the time of such application or of effecting the insurance. R. S. O. 1887, c. 167, s. 123; 56 V. c. 32, s. 9 (3).

(2) Instead of requiring the whole of the first payment to be made in cash at the time of insuring, the directors may make the said sum payable in annual instalments, the first of which shall be payable on the day of insuring, and there maining instalments shall be respectively payable on the first day of each subsequent year of the term of insurance. The said annual instalments may be known and described as "the first (or second, or as the case may be) fixed payment."

Provided that non-payment of any of the fixed payments subsequent to the first shall not forfeit the insurance unless thirty days' notice of the fixed payment due, or to become due, has been mailed to the person by whom the fixed payment is payable, directed to his post office address as given in his original application, or otherwise in writing to the company. 52 Vic c. 44, s. 2.

130.—All premium notes or undertakings belonging to the company shall be assessed under the direction of the board of directors, at such intervals from their respective dates, for such sums as the directors determine, and for such further sums as they think necessary and as are authorized by this Act for losses, expenses, and reserve, during the currency of the policies for which said notes or undertakings were given, and in respect of which they are liable to assessment; and every member of the company, or person who has given a premium note or undertaking shall pay the sums from time to time payable by him to the company during the continuance of his policy in accordance with the assessment and the assessment shall become payable in thirty days after notice thereof has been mailed to the member, or person who has given the premium note or undertaking, directed to his post office address, as given in his original application, or otherwise in writing to the company. R. S. O. 1887, c. 167, s. 124.

131.—If the assessment on the premium note or undertaking upon a policy is not paid within thirty days after notice mailed as in section 130 enacted, the contract of insurance, for which the assessment has been made shall be null and void as respects all claim for losses occurring during the time of non-payment; but the contract shall be revived when the assessment has been paid, unless the secretary gives notice to the contrary to the assessed party in the manner in this Act provided, but nothing herein contained shall relieve the assured from his liability to pay the assessment or any subsequent assessments, nor shall the assured party be entitled to recover the amount of loss or damage which happens to property insured under the contract while the assessment remains due and unpaid, unless the board of directors in their discretion decide otherwise. R. S. O. 1887, c. 167, s. 125; 53 V. c. 44, s. 3.

132.—A notice of assessment upon any premium note or undertaking mailed as aforesaid shall be deemed sufficient if it embodies the register number of the contract, the period over which the assessment extends, the amount of the assessment, the time when and the place where payable. R. S. O. 1887, c. 167, s. 126.

133.—Subject to the provisions of section 128, the assessment upon premium notes or undertakings shall always be in proportion to the amount of the notes or undertakings. R. S. O. 1887, c. 167, s. 127; 52 V. c. 31, s. 2.

“Provided that where any company alters its premium note rate, but still holds in respect of subsisting contracts premium notes of the prior rate, it shall be lawful for the company, as between the respective premium notes so differing in rate, to make and levy such differential assessments as will in risks of the same amount, and of the same class of hazard, equalize the cost of insurance to the makers of the respective premium notes.” 52 V. c. 31, s. 1.

134.—If, for thirty days after notice of assessment mailed as aforesaid, a member or other person who has given a premium note or undertaking refuses or neglects to pay the assessment, the company may sue for and recover the same with costs of suit, and such proceeding shall not be a waiver of any forfeiture incurred by such non-payment. R. S. O. 1887, c. 167, s. 128.

135.—Where an assessment is made on any premium note or undertaking given to the company for a risk taken by the company, or as a consideration for any policy of insurance issued, or to be issued by the company, and an action is brought to recover the assessment, the certificate of the secretary of the company, specifying the assessment and the amount due to the company on the note or undertaking by means

thereof, shall be taken and received as *prima facie* evidence thereof in any Court in this Province. R. S. O. 1887, c. 167, s. 129.

136.—(1) The company may form a reserve fund, to consist of all moneys which remain on hand at the end of each year, after payment of the ordinary expenses and losses of the company, and for that purpose the board of directors may levy an annual assessment not exceeding ten per centum on the premium notes or undertakings held by the company, and the reserve fund may from time to time be applied by the directors to pay off such liabilities of the company as may not be provided for out of the ordinary receipts for the same or any succeeding year. R. S. O. 1887, c. 167, s. 130 (1).

(2) The reserve fund shall be invested as provided by section 92. Cf. R. S. O. 1887, c. 167, s. 130 (2) ; 55 V. c. 39, s. 63 (1).

137.—(1) If there is a loss on property insured by the company, the board of directors may retain the amount of the premium note or undertaking given for insurance thereof until the time has expired for which insurance has been made, and at the expiration of said time the insured shall have the right to demand and receive such part of the retained sum as has not been assessed for. R. S. O. 1887, c. 167, s. 131.

(2) On the expiration of forty days after the term of insurance ended, the premium note or undertaking given for the term shall be absolutely null and void, except as to first payment or fixed payments remaining unpaid, and except as to lawful assessments of which written notice pursuant to sections 130 and 131 has been given to the maker of the premium note or undertaking during the currency of the policy or within the said period of forty days, and on the expiration of the said period the premium note or undertaking shall, upon application therefor, be given up to the maker thereof, provided all liabilities with which the premium note or undertaking is chargeable as aforesaid have been paid. 53 V. c. 44, s. 4.

138.—(1) Any action cognizable in a Division Court upon or for any premium note or undertaking, or any sum assessed or to be assessed thereon, may be entered and tried and determined in the court for the division wherein the head office of any agency of the company is situate. R. S. O. 1887, c. 167, s. 133.

Provided always, that the provisions of this section shall not apply to or include any such premium note or undertaking, nor any sum assessed thereon, unless within the body of such note or undertaking or across the face thereof, there was at the time of the making or entering into the same, printed in conspicuous type, and in ink of a color different from any other in or on such note the words following: "Any action which may be brought or commenced in a division court in respect or on account of this note or undertaking, or any sum to be assessed thereon, may be brought and commenced against the maker hereof in the Division Court for the division wherein the head office or any agency of the company is situate." 46 V. c. 35, s. 1.

(2) Where, in any Division Court suit or proceeding, a decision is rendered which, in effect or in terms, renders invalid any general assessment made by a mutual insurance company, such decision shall be appealable, notwithstanding the sum in dispute upon the appeal is less than \$100, and all the provisions contained in sections 148 to 153, both inclusive, of *The Division Courts Act* shall apply to such appeal. 52 V. c. 31, s. 3.

139.—No premium note or undertaking shall create a lien upon lands on which the insured property is situate.

140.—Any cash-mutual fire insurance company registered under this Act may effect any insurance upon the cash-premium principle, for a period not exceeding three years, on farm and other non-hazardous property, and for one year or less on any other class of property, but the amount of cash insurances in one year shall be

limited, so that the cash premiums received thereon during any one year shall not be in excess of one-half of the amount still payable in respect of premium notes or undertakings on hand on the thirty-first day of December of the previous year, according to the statement made under section 96, and all the property and assets of the company, including premium notes and undertakings, shall be liable for all losses which may arise under insurances for cash premiums, by any such company. R. S. O. 1887, c. 167, s. 135.

141.—(1) No execution shall issue against a mutual or cash-mutual company upon a judgment until after the expiration of sixty days from the recovery thereof, but this section shall not apply to any judgment recovered on any policy or undertaking of the company issued or given where more than sixty per centum of the premium, or premium note, or undertaking, was paid in cash at the time of the insurance or the application therefor. R. S. O. 1887, c. 167, s. 136 (1); 58 V. c. 34, s. 11 (2).

(2) A Judge in chambers, or a Master in chambers, shall upon the recovery of a judgment against the company, upon the application of the person in whose favor the same has been recovered, upon notice to the company, inquire into the facts, and if he shall certify that more than sixty per centum of the premium note, or undertaking, was paid in cash at the time of the insurance, or upon the application therefor, execution may be forthwith issued upon such judgment, R. S. O. 1887, c. 167, s. 136 (2); 58 V., c. 34, s. 11 (2).

GENERAL PROVISIONS RELATING TO CONTRACTS OF INSURANCE.

142.—Sections 143 to 146 inclusive shall apply to contracts of insurance generally.

143.—When the subject matter of any insurance contract is property, or an insurable interest within the jurisdiction of Ontario, or is a person domiciled or resident therein, any policy, certificate, interim receipt, or writing evidencing the contract shall, if signed, countersigned, issued or delivered over in Ontario, or committed to the post office or to any carrier, messenger or agent, to be delivered or handed over to the assured, his assign or agent in Ontario, be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all moneys payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insuring corporation, in lawful money of Canada, and this section shall have effect notwithstanding any agreement, condition or stipulation to the contrary. 56 V. c. 32, s. 10 (1).

144.—(1) Where any insurance contract made by any corporation whatsoever, within the intent of section 2 of this Act is evidenced by a sealed or written instrument, all the terms and conditions of the contract shall be set out by the corporation in full on the face or back of the instrument forming or evidencing the contract, and unless so set out, no term of, or condition, stipulation, warranty or proviso, modifying or impairing the effect of any such contract made or renewed after the commencement of this Act shall be good and valid, or admissible in evidence to the prejudice of the assured or beneficiary. 52 V. c. 32, s. 4. 55 V. c. 39, s. 33 (1).

Provided that nothing herein contained shall exclude the proposal or application of the assured from being considered with the contract, and the court shall determine how far the insurer was induced to enter into the contract by any material misrepresentation contained in the said application or proposal. 58 V. c. 34, s. 5 (10).

Provided also, that a registered friendly society may instead of setting out the complete contract in the certificate or other instrument of contract, indicate therein by particular references those articles or provisions of the constitution, by-laws or rules which contain all the material terms of the contract not in the instrument of

contract itself set out, and the society shall at or prior to the delivery over of such instrument of contract deliver also to the assured a copy of the constitution, by-laws and rules therein referred to.

Provided also, that nothing in sub-sections 1, 2 and 3 of this section contained shall be deemed to impair the effect of the provisions contained in sections 168 to 173 inclusive, or the effect of the provisions contained in section 54 of an Act passed in the fifty-second year of Her Majesty, and chaptered 33." 55 V. c. 30, s. 33 (1).

(2) No contract of insurance made or renewed after the commencement of this Act shall contain, or have endorsed upon it, or be made subject to any term, condition, stipulation, warranty or proviso, providing that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract by the corporation, unless such term, condition, stipulation, warranty or proviso is limited to cases in which such statement is material to the contract, and no contract within the intent of section 2 of this Act, shall be avoided by reason of the inaccuracy of any such statement, unless it be material to the contract. 52 V. c. 32, s. 5. 55 V. c. 30, s. 33 (2).

(3) The question of materiality in any contract of insurance whatsoever shall be a question of fact for the jury, or for the Court if there be no jury, and no admission, term, condition, stipulation, warranty or proviso to the contrary, contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto shall have any force or validity. 55 V. c. 30, s. 33 (3).

145.—(1) After any loss or damage to insured property the insurer has, by a duly accredited agent an immediate right of entry and access sufficient to survey and examine the property, and make an estimate of the loss or damage, but the insurer is not entitled to the disposition, control, occupation, or possession of the insured property, or of the remains or salvage thereof, unless the insurer undertakes reinstatement, or accepts abandonment of the property. 55 V. c. 30, s. 33 (4).

(2) After loss or damage to insured property, it is the duty of the assured when, and as soon as practicable, to secure the insured property from damage, or from further damage, and to separate as far as reasonably may be, the damaged from the undamaged property, and to notify the insurer when such separation has been made, and thereupon the insurer shall be entitled to entry and access sufficient to make an appraisalment or particular estimate of the loss or damage.

Provided that at any time after the loss or damage the insurer and the assured may under a term of the contract of insurance or by special agreement make a joint survey, examination, estimate, or appraisalment of the loss or damage, in which case the insurer shall be deemed to have waived all right to make a separate survey, examination, estimate or appraisalment thereof. 55 V. c. 30, s. 33 (4).

146.—(1) In case of several actions being brought for insurance money, the Court shall consolidate or otherwise deal therewith so that there shall be but one action for and in respect of the shares of all the persons entitled under a policy.

(2) If an action is brought for the share of one or more infants entitled, and the other infants entitled, or the trustees, executors, or guardians entitled to receive payments of the shares of such other infants, shall be made parties to the action, and the rights of all the infants shall be dealt with and determined in one action. The persons entitled to receive the shares of the infants may join with any adult persons claiming shares in the policy. In all actions where several persons are interested in the money, the Court or Judge shall apportion among the parties entitled any sum directed to be paid, and shall give all necessary directions and relief. R. S. O. 1887, c. 136, s. 19.

(3) In any action commenced in a Division or County Court for any insurance or benefit alleged to be payable to the assured or any beneficiary, assignee, representative or guardian, when the insurance or benefit claimed is in the nature of an annuity or other periodical or recurring payment, so that the present or capitalized value

of the insurance or benefit amounts or may amount to a sum beyond the jurisdiction of the Court in which the action is brought the defendant may file with the Registrar or Local Registrar of the High Court the affidavit setting out such facts, and thereafter upon the application of the defendant the action shall be removable into the High Court of Justice. Cf. 52 V. c. 31, s. 3.

INSURANCE OF THE PERSON.

1. *General provisions applicable to all Insurers.*

147.—Sections 148 to 165, inclusive, shall apply to insurance of the person within the meaning of sub-section 34 of section 2.¹

148.—(1) In any insurance of the person, where the money payable by way of premiums, dues or assessments (not being the initial premiums, dues or assessments), under any contract whatsoever, is unpaid, any of the persons hereinafter mentioned may within thirty days from and including the first day on which the money is due, by registered letter or otherwise, pay, deliver or tender to the company at its head office, or at its chief agency in Ontario, or to the company's collector or authorized agent, the sum in default. On payment, delivery or tender as aforesaid by the assured, or by any of the beneficiaries under the contract, the contract shall be deemed to have been *ipso facto* revived or renewed, and any stipulation or agreement to the contrary shall, as against the assured or his beneficiaries, be utterly void, the thirty days hereinbefore mentioned shall run concurrently with the period of grace or credit (if any) allowed by the insurer for the payment of a premium or of an instalment of premium, and nothing herein contained shall be deemed to extend the period of grace of credit beyond the total of thirty days. This sub-section shall not be deemed to extend the time allowed for the payment of contributions or assessments by section 165 of this Act. 56 V. c. 32, s. 10 (12).

(2) Notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within the term of one year next after the happening of the event insured against or within the further term of six months, by leave of a Judge of the High Court, or the Master in Chambers upon its being shown to his satisfaction that there was a reasonable excuse for not commencing the action or proceeding within the first mentioned term. 56 V. c. 32, s. 10 (12).

149.—(1) Where the age of a person is material to any contract and such age is given erroneously in any statement or warranty made for purposes of the contract, such contract shall not be avoided by reason only of the age being other than as stated or warranted, if it shall appear that such statement or warranty was made in good faith and without any intention to deceive, but the person entitled to recover on such contract shall not be entitled to recover more than an amount which bears the same ratio to the sum that such person would otherwise be entitled to recover as the premium proper to the stated age of such person bears to the premium proper to the actual age of such person, the said stated age and the actual age being both taken as at the date of the contract. 52 V. c. 32, s. 6 (1); 55 V. c. 39, s. 34 (1).

Provided that in no case shall the amount receivable exceed the amount stated or indicated in the contract. 55 V. c. 39, s. 34 (1).

Provided, also, that where the application for and contract of insurance expressly limit the insurable age, and where the actual age of the applicant for insurance at the date of his application exceeds the age so limited, the contract shall, during the lifetime of the assured and not later than five years from the date of the contract, be voidable at the discretion of the insurer within thirty days after the error in age comes to the knowledge of the insurer. 58 V. c. 34, s. 5 (11).

¹ It is evidently owing to a clerical error that sub-section 34, instead of 36, has been referred to.

(2) For purposes of the next preceding sub-section the word "premium" shall mean the net annual premium as shown in or deduced from the Hm. Tables of the Institute of Actuaries of Great Britain, the rate of interest being taken at 4½ per cent per annum. 52 V. c. 32, s. 3; 55 V. c. 39, s. 34 (2); 56 V. c. 32, s. 10 (10).

(3) If the error in age includes a fractional part of a year exceeding a half year, such fractional part shall be computed as a whole year, but if the fractional part does not exceed a half year it shall be wholly disregarded in the computation. 52 V. c. 32, s. 6 (2); 55 V. c. 39, s. 34 (3).

(4) When by the terms and for the purposes of the contract, the age of the person in respect of whose age the contract is taken to be greater than the actual age of such person, the number of years added to such age shall, for purposes of the calculation provided for by this section, be added to the true age of such person. 52 V. c. 32, s. 6 (2); 55 V. c. 37, s. 34 (4).

(5) Where any error is discovered in respect of any contract of insurance, or of the premium or premiums paid or to be paid upon such contract, nothing herein contained shall be construed in any way to prevent at any time before the maturity of the contract an adjustment between the insurer and the assured of the amount or amounts payable in respect of any insurance effected, or of the premium or premiums paid or to be paid. 55 V. c. 39, s. 34 (5).

150.—(1) In any insurance of the person, except an annuity on life, it is necessary for the validity of the contract that the beneficiary under the contract (being other than the assured, or the parent, or *bona fide* donee, grantee or assignee of the assured, or a person entitled under the will of the assured, or by operation of law), have had at the date of the contract a pecuniary interest in the duration of the life or other subject insured, provided that any otherwise lawful contract of annuity upon life shall not require for its validity that the annuitant has or at any time had an insurable interest in the life of the nominee. 55 V. c. 39, s. 35 (2).

(2) No corporation shall insure or pay on the death of a child under 10 years of age, any sum of money which added to any sum payable on the death of such child by any other insuring corporation exceed the following amounts respectively, that is to say:—

If any such child dies under the age of 2 years, \$32			
"	"	"	3 " 40
"	"	"	4 " 48
"	"	"	5 " 56
"	"	"	6 " 83
"	"	"	7 " 92
"	"	"	8 " 110
"	"	"	9 " 129
"	"	"	10 " 147

Provided that nothing in this section contained shall apply to such insurances on the lives of children under ten years of age as were in force on the fourteenth day of April, 1892, or apply to insurance on the lives of children of any age where the person affecting the insurance has a pecuniary interest in the life of the assured. 55 V. c. 39, s. 35 (3).

(3) Where the age of the assured is at the date of the contract, less than ten years, and the insuring corporation has knowingly, or without sufficient enquiry, entered into any contract prohibited by the next preceding subsection, the premiums paid thereupon shall be recoverable from the corporation by the person or persons paying the same together with legal interest thereon. 55 V. 39, s. 35 (4).

(4) Every corporation undertaking or effecting insurances on the lives of children under ten years of age shall print subsections 1, 2, 3, 4 and 5 of this section in conspicuous type upon every circular soliciting, and upon every application for, and every instrument of contract of, such insurance; and any contravention of this subsection shall be punishable as for an offence against section 85, the precedings and penalty

enacted in which section shall equally apply to an offence committed against this sub-section. 55 V. c. 39, s. 35 (5).

Provided that instead of printing the matter required by this subsection, the company may with the consent in writing of the Insurance Registrar print or stamp the following words in lieu thereof :—" Any insurance undertaken or offered to be undertaken in the Province of Ontario in respect of the lives of children under ten years of age is subject to the restrictions enacted by sub-sections 1 and 5 (inclusive) of section 150 of *The Ontario Insurance Act, 1897.*" 56 V. c. 32, s. 10 (11).

(5) In respect of insurances heretofore or hereafter effected on the lives of persons under twenty-one years of age, where such insurance has been effected by a parent upon the life of his child, such insurance shall not be deemed to be invalid by reason only of the parent's want of pecuniary interest in the life of the child. 55 V. c. 39, s. 35 (6).

(6) In respect of insurance heretofore or hereafter, by any person not of the full age of twenty-one years but of the age of fifteen years or upwards effected upon his own life, for either his own benefit or for the benefit of his father, mother, brother or sister, the assured shall not by reason only of his minority, be deemed incompetent to contract for such insurance or for the surrender of such insurance, or to give a valid discharge for any benefit accruing, or for money payable under the contract. 55 V. c. 39, s. 35 (7).

151.—(1) Every person of the full age of twenty-one years shall be deemed to have an unlimited insurable interest in his own life and may effect *bona fide* at his own charge insurance or insurances of his own person for the whole term of life, or any shorter term for the sole or partial benefit of himself, or his estate or any other person, persons or corporation whatsoever, whether such other beneficiary has or has not an insurable interest in the life of the assured. The insurance money may be made payable to any person either for his own use or as trustee for another person.

(2) If the policy was effected and premiums paid by the assured with intent to defraud his creditors, the creditors shall be entitled to receive out of the sum secured an amount equal to the premiums so paid. R. S. O., 1887, c. 136, s. 22.

(3) The assured may designate or ascertain the beneficiary by the contract of insurance or by instrument in writing attached to or endorsed on, or identifying the said contract by number or otherwise, and may by the said contract or by the above mentioned, or other like instrument apportion the insurance money, or by like instrument from time to time reapportion the same, or alter or revoke the benefits, or trusts or add or substitute new beneficiaries, or trustees, or divert the insurance money wholly or in part to himself or his estate, provided that the assured shall not alter, or revoke, or divert the benefit of any person who is a beneficiary for value; nor shall the assured divert the benefit of a person who is of the class of preferred beneficiaries to a person not of the said class or to the assured himself, or to his estate. 59 V. c. 45, s. 2 (2).

(4) This section applies not only to any future contract of insurance, and to any declaration made on or relating to any such contract, but also to any contract of insurance heretofore issued and declaration heretofore made.

(5) Nothing contained in this Act shall be held or construed to restrict or interfere with the right of any person to effect or assign a policy for the benefit of any one or more beneficiaries, in any other mode allowed by law. R. S. O. 1887, c. 136, s. 23.

(6) If one or more of the beneficiaries die in the lifetime of the assured, and no apportionment or other disposition is subsequently made by the assured, the insurance shall be for the benefit of the surviving beneficiary or beneficiaries in equal shares if more than one; and if all the beneficiaries die in the lifetime of the assured, the benefit of the contract and the insurance money shall form part of the estate of the assured. R. S. O. 1887, c. 136, s. 9.

(7) Until the insurer has received the original or a copy of any declaration, apportionment, will or other instrument or disposition in writing affecting the in-

insurance moneys or any portion thereof, or of any appointment or any revocation of a trustee, the insurer may deal with and obtain a valid discharge from the assured, or (as in the respective case may be) with and from his beneficiaries (such beneficiaries not being persons under incapacity), or with and from his trustees, executors, administrators or assigns in the same manner and with the like effect as if such declaration, apportionment, disposition, appointment or revocation had not been made. 59 V. c. 45, s. 5.

152.—In every contract of insurance against accident or casualty, or disability, total or partial, the event insured against shall be deemed to include any bodily injury occasioned by external force or agency, and either happening without the direct intent of the person injured, or happening as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger, and no term, condition, stipulation, warranty or proviso of the contract varying the aforesaid obligation or liability of the corporation shall as against the assured have any force or validity. 55 V. c. 39, s. 36.

153.—(1) Where the event has happened on the occurrence of which any benefit or insurance money is payable under the contract, but the amount payable is matter of dispute, the amount payable by the insurer to the beneficiary shall *prima facie* be the maximum amount stated or indicated in the contract, and it shall lie on the insurer to prove the contrary. 55 V. c. 39, s. 41 (1).

(2) If, when a claim accrues under a contract, the insurer offers the claimant a less sum than the maximum named in the contract, and either offers no explanation, or alleges as a reason for not paying the maximum, that the insurer's general contract fund, or some other fund is insufficient, the claimant shall, on written notice to the insurer, be entitled as of right, to inspect personally or by agent, all books and documents relating to the contract funds generally, or the fund alleged to be insufficient. 55 V. c. 39, s. 46 (1).

(3) If the insurer refuses or neglects to afford the claimant a reasonable opportunity of inspection as in the last sub-section provided, the claimant may file with the Insurance Registrar, an affidavit to the effect that he rightfully claims under a certain contract of the insurer, giving particulars sufficient to identify the contract, or if required, producing the contract, and that the insurer has refused or neglected to afford him opportunity of inspection as aforesaid, thereupon the Insurance Registrar may, under his hand and seal, give the claimant or his agent an order to inspect on a day named; and neglect or refusal thereafter to afford him an opportunity of inspection, shall be an offence, punishable as an offence or offences committed against section 85, the proceedings and penalty enacted in which section shall equally apply in the case of an offence against this section. 55 V. c. 39, s. 46 (2).

154.—(1) When the insurance money becomes due and payable, it shall be paid within the time prescribed by section 80, and according to the terms of the policy or of any declaration or instrument as aforesaid, and shall, in the case of preferred beneficiaries, be free from the claims of any creditors of the assured except as in section 151 provided. R. S. O. 1887, c. 135, s. 10 (1).

(2) Where the insurance money or part thereof is for the benefit, in whole or in part, of infants, and the infants are mentioned as a class and not by their individual names, the money shall not be payable to the infants until reasonable proof is furnished to the insurer of the number, names and ages of the infants entitled. R. S. O. 1887, c. 136, s. 10 (2).

155.—(1) The insured may, by the policy or by his will, or by any writing under his hand, appoint a trustee or trustees of the money payable under the contract of insurance, and may from time to time revoke such appointment in like manner, and appoint a new trustee or new trustees, and for the investment of the moneys payable under the contract. Payment made to such trustee or trustees shall discharge the corporation. R. S. O. 1887, c. 136, s. 11.

(2) If no trustee is named in the contract of insurance, or appointed as mentioned in sub-section 1, to receive the shares to which infants are entitled, their shares may be paid to the executors of the last will and testament of the assured, or to a guardian of the infants duly appointed by one of the Surrogate Courts of this Province or by the High Court, or to a trustee appointed by the last named Court, upon the application of the wife, or of the infants or their guardian, and such payment shall be a good discharge to the insurance corporation.

(3) A guardian appointed under subsection 2 shall give security to the satisfaction of the Court or Judge for the faithful performance of his duty as guardian, and for the proper application of the money which he may receive.

Provided that where any insurance money not exceeding \$3,000 is payable to the wife and children of the assured, and some or all of the children are infants, the Court or Judge shall have discretion to appoint the widow of the assured, being the mother of such infants, as their guardian without security.

(4) Where probate is sought in respect of a will for the sole purpose of obtaining insurance money, the fees payable on an appointment of a guardian or representative shall be as follows :

Where the insurance money does not exceed \$1,000, \$4; where the insurance money exceeds \$1,000, but does not exceed \$2,000, \$6; where the insurance money exceeds \$2,000, but does not exceed \$3,000, \$8; and such fees shall be regulated in the manner prescribed by section 69 of *The Surrogate Courts Act*. Cf. R. S. O. 1887, c. 136, s. 14.

(5) Subject to the express terms of the trust instrument (if any), any trustee named as provided for in subsections 1, 2 and 3, and any executor or guardian may invest the money received in any security in which trustees under the law of the Province may invest trust funds, and may from time to time alter, vary and transpose the investments and apply all or part of the annual income arising from the share or presumptive share of each of the infants, in or towards his or her maintenance and education, in such manner as the trustee, executor or guardian thinks fit, and may also advance to and for any of the infants, notwithstanding his or her minority, the whole or any part of the share of the infant of and in the money, for the advancement or preferment in the world, or on the marriage, of such infant. R. S. O. 1887, c. 136, s. 13.

156.—(1) Where under a contract made or by law deemed to be made in Ontario or a contract issued by an insurance corporation having its head office in Ontario, the insurance money is payable to the representative of a person who at his death was domiciled or resident in a foreign jurisdiction, and no person has become his personal representative in Ontario, the money may, on the expiration of two months after such death, be paid to the personal representative appointed by the Court of the foreign jurisdiction, provided it appears upon the probate or letters of administration, or other like document of such court, or by a certificate of the Judge, under the seal of the Court, that it has been shewn to the satisfaction of the Court that the deceased at the time of his death was domiciled or resident at some place within the jurisdiction of such Court. R. S. O. 1887, c. 167, s. 137 (1); 51 V. c. 25, s. 1.

(2) When the contract of such insurance provides that the insurance money may be paid to the personal representative appointed by the Court of the jurisdiction in which the deceased was resident or domiciled at the time of his death, the money may be paid to such representative accordingly at any time after the death aforesaid or according to the terms of the policy. 51 V. c. 25, s. 1.

(3) Where under a contract made or by law deemed to be made, in Ontario the insurance money is payable to the representatives of a person who at the time of his death was domiciled or resident in a foreign jurisdiction and died intestate, the money may after the expiration of three months after such death, if no person has become his personal representative in Ontario—be paid to the person or persons entitled according to the law of the foreign jurisdiction to receive the money and give

a discharge for the same as if such money were by the terms of the contract payable in such foreign jurisdiction. 52 V. c. 32, s. 7.

(4) When a testator domiciled or resident in a foreign jurisdiction disposes of the insurance money by a will, valid according to the law of that jurisdiction, then such money may be paid at any time after death, or according to the terms of the contract in that behalf, to the person or persons entitled under such will to receive and give a valid discharge for money payable in such foreign jurisdiction. 52 V. c. 33, s. 7.

(5) Where it appears upon any letters of guardianship or other like document, relating to persons under incapacity, issued or to be issued by a Court in a foreign jurisdiction, or by a certificate of the Judge under the seal of such Court, that it has been shewn to the satisfaction of such Court that the assured at the maturity of the policy was domiciled or resident within its jurisdiction, and where security to the satisfaction of the Court has been given by the guardian or other like officer appointed by the said letters or document, then the High Court upon application for the appointment of the said guardian or like officer as trustee under this section, may dispense with the giving of security, provided it has also been shown that the infants or other beneficiaries under incapacity reside within the jurisdiction of the foreign Court, and that the proposed trustee is a fit and proper person, and that the security has, in accordance with the practice of such foreign Court, been given in respect of and for the due application and account of the money payable under the policy. 56 V. c. 32, s. 7; 59 V. c. 45, s. 4 (2).

(6) This section applies to policies heretofore issued as well as to policies to be issued hereafter, and whether the death has occurred before the passing of this Act or not. R. S. O. 1887, c. 167, s. 137 (2).

157.—(1) If there is no trustee, executor, or guardian competent to receive the share of any infant in the insurance money, and the insurer admits the claim or any part thereof, the insurer at any time after the expiration of two months from the date of its admission of the claim or part thereof, may obtain an order from the High Court of the payment of the share of the infant into Court, and in such case the costs of the application shall be paid out of the share (unless the Court otherwise directs), and the residue shall be paid into Court pursuant to the order, and such payment shall be a sufficient discharge to the insurer for the money paid; and the money shall be dealt with as the Court may direct. R. S. O. 1887, c. 136, s. 15 (1).

(2) If the insurer does not within sixty days from the time that the claim is admitted, either pay the same to some person competent to receive the money under this Act, or pay the same into the High Court, the said Court may upon application made by some one competent to receive the said money or by some other person on behalf of the infant, order the insurance money, or any part thereof, to be paid to any trustee, executor, or guardian competent to receive the same, or to be paid into Court to be dealt with as the Court may direct, and any such payment shall be a good discharge to the insurer. R. S. O. 1887, c. 136, s. 15 (2).

(3) The Court may order the costs of the application, and any costs incidental to establishing the authority of the party applying for the order, to be paid out of such moneys, or by the insurer, or otherwise, as may seem just, and the Court may also order the costs of, and incidental to, obtaining out of Court moneys voluntarily paid in by an insurer, to be paid out of such moneys. R. S. O. 1887, c. 36, s. 15 (3).

158.—(1) If a person who has heretofore effected, or who hereafter effects, an insurance for the benefit of any preferred beneficiary or beneficiaries, whether such benefit appears by the terms of the policy or by endorsement thereon, or by an instrument referring to and identifying the policy, finds himself unable to continue to meet the premiums, he may surrender the policy to the insurer, and accept in lieu thereof a paid up policy for such sum as the premiums paid would represent, payable at death or at the endowment age or otherwise, as the case may be, in the same manner as the money insured by the original policy if not surrendered would have been payable; and the company may accept the surrender and grant the paid up

policy, notwithstanding any declaration or direction in favor of any preferred beneficiary or beneficiaries. R. S. O. 1887, c. 136, s. 16.

(2) The assured may, from time to time, borrow from the insurer, or from any other corporation, company or person, on the security of the policy, such sums as may be necessary and shall be applied to keep the policy in force, and on such terms and conditions as may be agreed on; and the sums so borrowed, together with such lawful interest thereon as may be agreed, shall, so long as the contract remains in force, be a first lien on the contract and on all moneys payable thereunder, notwithstanding any declaration or direction in favor of any preferred beneficiary or beneficiaries. R. S. O. 1887, c. 136, s. 17.

(3) Where all the beneficiaries, whether preferred or ordinary, are of full age, they and the assured may surrender the contract of insurance, or assign the same, either absolutely or by way of security. R. S. O. 1887, c. 136, s. 24; 51 V. c. 22, s. 4; 53 V. c. 39, s. 8.

(4) Where by any contract of insurance or by the declaration endorsed upon or attached to or identifying by its number or otherwise, any contract of insurance (whether such declaration has heretofore been or shall hereafter be made), it is provided that the contract shall be for the benefit of a person, and in the event of the death of such person for the benefit of another person, such first mentioned person shall, if living, be deemed for the purposes of subsection 3 of this section, the person entitled to be benefited under such contract. R. S. O. 1887, c. 136, s. 25; 53 V. c. 39, s. 7 (1).

(5) This section shall apply not only to any future contract of insurance, and to any declaration made or relating to any such contract, but also to any contract of insurance heretofore issued and declaration heretofore made. 53 V. c. 39, s. 7 (2).

159.—(1) Where a person (hereinafter called the assured) effects insurance on his or her own life, and either by the contract of insurance, or by instrument in writing attached to or endorsed on, or identifying the said contract by number or otherwise, declares the insurance money or a portion of the principal or interest thereof to be for the benefit of the husband, wife, children, grandchildren or mother of the assured, then such contract shall (subject to the right of the assured to apportion or alter as hereinafter enacted) create a trust in favor of the said beneficiary or beneficiaries, according to the intent so expressed or declared, and so long as any object of the trust remains, the money payable under the contract shall not be subject to the control of the assured, or of his or her creditors, or form part of his or her estate, when the sum secured by the contract becomes payable; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration. R. S. O. 1887, c. 136, s. 5; 53 V. c. 39, s. 4, and s. 5; 56 V. c. 32, s. 8 (1) (2); 59 V. c. 45, s. 2.

(2) The husband, wife, children, grandchildren and mother of the assured shall constitute a class which may be known as "preferred beneficiaries," and all other beneficiaries may be known as "ordinary beneficiaries."

(3) In the case of a policy or written contract of life insurance effected before marriage, a declaration under this section shall be, and shall be deemed to be as valid and effectual as if such policy or contract had been effected after marriage. 53 V. c. 39, s. 2.

(4) When a contract of life insurance is effected by an unmarried man, for the benefit of his future wife, or future wife and children, but the contract does not designate by name, or otherwise clearly ascertain a specific person as such intended wife, the contract (not being within the intent of subsection 5 or 6 hereof) shall be construed as provided in sub-section 7. 53 V. c. 39, s. 3 (1).

(5) When a contract is effected as in sub-section 4, but at the maturity of the contract, the assured is still unmarried, or is a widower without issue, the insurance money shall fall into, and become part of the estate of the assured. 53 V. c. 49, s. 3 (2).

(6) When a contract of life insurance is effected by an unmarried man, for the benefit of his future wife, or future wife and children, and the intended wife is designated by name, or is otherwise clearly ascertained in the contract, but the intended marriage does not take place, all questions arising on such contract shall be determined as if this Act had not been passed. 53 V. c. 39, s. 3 (2).

(7) Where two or more beneficiaries are designated or ascertained but no apportionment as among them is made, all the said beneficiaries shall be held to share equally in the same, and where it is stated in the policy or declaration that the insurance is for the benefit of the wife and children generally, or of the children generally, without specifying the names of the children, the word "children" shall be held to mean all the children issue of the assured, living at the maturity of the policy, whether by his then or any former wife, and the wife to benefit by the policy shall be the wife living at the maturity thereof. R. S. O. 1887, c. 136, s. 7 (1).

(8) If one or more of the preferred beneficiaries in whose favour the apportionment has been made, die in the lifetime of the insured, the assured may, by an instrument in writing, attached to or endorsed on or referring to and identifying the policy of insurance, by number or otherwise, declare that the share formerly apportioned to the person so dying shall be for the benefit of such other person or persons as he may name in that behalf, not being other than one or more of the class of preferred beneficiaries, and in default of any such declaration, the share of the person so dying shall be for the benefit of the survivors of such preferred beneficiaries in equal shares. R. S. O. 1887, c. 136, s. 8; 59 V. c. 45, s. 4 (2).

(9) This section applies not only to any future contract of insurance, and to any declaration made on or relating to any such contract, but also to any contract of insurance heretofore issued and declaration heretofore made. R. S. O. 1887, c. 136, secs. 1, 2, 5; 53 V. c. 39, secs. 2, 4, 5; 56 V. c. 32, secs. 8 (1), (2); 59 V. c. 45, s. 1.

160.—(1) The assured may, by an instrument in writing attached to or endorsed on, or identifying the policy by its number or otherwise, vary a policy or declaration or an apportionment previously made, so as to restrict or extend, transfer or limit, the benefits of the policy to the wife alone or to the children, or to one or more of them, or to the mother or any other preferred beneficiary of the assured, as a beneficiary or sole beneficiary, although the policy is expressed or declared to be for the benefit of the wife and children, or of the wife alone, or of the child or children alone, or of the mother, or such other preferred beneficiary, or for the benefit of the wife for life, and of the children after her death, or for the benefit of the wife, and in case of her death during the life of the assured, then for the child or children, or any of them, or for the benefit of any one or more of the above-mentioned persons for life, and, after his or their decease, for the benefit of any one or more of the survivors; or, although a prior declaration was so restricted; and he may also apportion the insurance money among the persons so intended to be benefited; and may, from time to time, by instrument in writing attached to or endorsed on the policy, or referring to the same, alter the apportionment as he deems proper; he may also, by his will make or alter the apportionment of the insurance money; and an apportionment made or altered by his will, shall prevail over any other made before the date of the will, except so far as such other apportionment has been acted on before notice of the appointment by will; and whatever the assured may, under this section, do by an instrument in writing attached to or endorsed on or identifying the policy, or a particular policy or policies, by number or otherwise, he may also do by a will identifying the policy or a particular policy or policies by number or otherwise. 59 V. c. 45, s. 2 (1).

(2) "Apportion" or "apportionment" in this section includes and authorizes any division, sub-division, re-apportionment, or disposition of insurance moneys or benefits among any of the class of persons who under this or any amending Act are persons included in the class of preferred beneficiaries; and also includes and authorizes any disposition of the said moneys or benefits such as partly or wholly to

divest the right or to enlarge or diminish the interest of a beneficiary or beneficiaries acquired under any prior disposition of the said moneys or benefits, or such as to substitute one beneficiary of the said class for any other or others, or all others, or conversely. 50 V. c. 45, s. 2 (2).

Provided that the assured shall not by virtue of the preceding subsections be authorized to divert the said moneys, or benefits from all of the said class to a person not of the said class, or to the assured himself, or to his estate; or to divert the said insurance moneys or benefits, or any part thereof, from the original beneficiary when the policy expressly states that the beneficiary was a beneficiary for value. 50 V. c. 45, s. 2 (2).

(3) Where it is proved to the satisfaction of the executive of a registered friendly society that any beneficiary under an insurance certificate or contract of the society is leading a criminal or an immoral life, then, and notwithstanding anything contained in this, or any other Act of the Province, it shall be competent for the assured, with the consent of the said executive, to declare either by endorsement on the certificate or contract or by other writing, that all right, title and interest of the said beneficiary in or to the benefit under the certificate is forfeited and annulled; and thereupon the said right, title and interest shall be forfeited and annulled accordingly; and the assured by a like writing may then or thereafter from time to time make a new appropriation in accordance with the lawful rules of the society, and may reappropriate the benefit; and the right of the assured in this behalf shall be in addition to his rights under this or other Acts of the Province. 57 V. c. 48, s. 4 (1).

(4) Where the contract is made by an insurer other than as mentioned in subsection 3, then upon petition, and upon the like facts as in the said sub-section proved to the satisfaction of a Judge of the High Court the Judge may make an order annulling the benefit and granting such other relief as under the circumstances appears proper.

(5) This section applies not only to any future contract of insurance, and to any declaration made on or relating to any such contract, but also to any contract heretofore issued, and declaration heretofore made. 57 V. c. 48, s. 4 (2); 59 V. c. 45, s. 2 (3).

161.—(1) The assured may, in writing, require the insurer to pay the bonuses or profits, or portions thereof, accruing under the contract of insurance, to the assured, or to apply the same in reduction of the annual premiums payable by the assured, in such way as he may direct; or to add the said bonuses or profits to the benefit; and the insurer shall pay or apply such bonuses or profits as the assured directs; and according to the rates and rules established by the insurer: Provided always that the insurer shall not be obliged to pay or apply such bonuses or profits in any other manner than as lawfully stipulated in the contract or the application therefor. This section applies to contracts made before the 4th day of March, 1881, and to bonuses and profits then declared in respect of such policies, as well as to policies thereafter made and hereafter to be made. R. S. O. 1887, c. 136, s. 18.

(2) Any contract of insurance may be surrendered or assigned:

(a) Where the policy is for the benefit of children only, and the children surviving are all of the full age of twenty-one years, if the assured and all such surviving children agree to so surrender or assign; or

(b) Where the policy is for the benefit of both a wife and children, and the surviving children are all of the full age of twenty-one years, if the assured, and his then wife (if any) and all such surviving children agree to so surrender or assign; or

(c) Where the policy is for the benefit of a wife only, or of a wife and children, and there are no children living, if the assured and his then wife agree to so surrender or assign. R. S. O. 1887, c. 136, s. 7 (2).

2. Additional provisions, applicable to Friendly Societies only.

162.—The additional provisions contained in sections 163 to 165 inclusive shall apply only to friendly societies registered as such under this Act.

163.—(1) A copy of all rules of a friendly society relating to its insurance contracts and to the management and application of the insurance funds shall be delivered by the society to every person on demand, on tender of twenty-five cents. 55 V. c. 30, s. 32 (1);

(2) If any officer or agent of a society, with intent to mislead or defraud, gives to any person a copy of rules other than the rules then in force, on the pretence that the same are the rules then in force, he shall be guilty of an offence; and shall, upon summary conviction thereof before any Police Magistrate or Justice of the Peace having jurisdiction where the offence was committed, be liable as for an offence committed against section 85 of this Act. 55 Vic. c. 30, s. 32 (2).

(3) Any revision of or amendment to the rules of a corporation directed in terms of this Act by the Insurance Registrar to be made and made accordingly or purporting to be so made and certified by the said Registrar as conformable to his direction, or as assented to by him when assent in writing suffices without direction, shall so certified be transferred to the office of the Provincial Registrar, there to be filed and indexed, and the rules so certified shall, notwithstanding the declaration or other instrument filed under any general or special Act, be final and conclusive evidence of the rules in force on, from and after the date of the said certificate until any subsequent revision or amendment in like manner certified and filed, and so from time to time; and until so revised or amended and the revision or amendment is so certified, the prior certified rules shall be binding and obligatory upon all members of the corporation. 58 V. c. 34, s. 4 (1).

(4) Where at any time doubt arises as to what are the subsisting rules of the corporation, the Insurance Registrar may hear and determine the question, and his certificate filed as in the next preceding sub-section shall have the same effect as therein enacted. 58 V. c. 34, s. 4 (2).

164.—(1) The liabilities of any member of a friendly society under his contract shall at any date be limited to the assessments, fees and dues of which at that date notice has been actually given by the society. 55 V. c. 30, s. 30 (1).

Provided that the society with the assent in writing of the Registrar of Friendly Societies may from time to time make other provision by its rules for the absolute severance of a member and the determination of his liability; and such other rules, together with the written assent, shall be transferred to the office of the Provincial Registrar, there to be filed and indexed; and on, from and after the day of the said assent, the said rules shall be binding and obligatory upon all the members until superseded by other provision in like manner filed.

Provided also that in no case shall the period over which the said assessments, fees and dues extend exceed twelve months. 58 V. c. 34, s. 6 (5).

(2) By paying or tendering payment of said assessments, fees and dues, and giving notice thereupon of his withdrawal by a writing delivered, or by registered letter to the society, any member shall become thereby released from all further liability under his contract. 55 V. c. 30, s. 30 (2).

165.—(1) No forfeiture or suspension shall be incurred by any member of a friendly society, or person insured therein, by reason of any default in paying any contributions or assessment, except such as are payable at fixed dates, until after notice to the member stating the amount due by him, and apprising him that in case of default of payment by him within a reasonable time, not being less than thirty days, to the proper officer, to be specified in such notice, his interest or benefit will be forfeited or suspended, and until after default has been made by him in paying his contribution or assessment in accordance with such notice. "Fixed

date" in this sub-section shall include any numbered day, or any Monday, Tuesday, (or as the case may be), numbered, alternate, or recurring, of a stated month or months.

For any purpose of this Act or of the rules of the society notice may effectually be given if written or printed notice is delivered, or by registered post prepaid is sent to the member, or left at his last known place of abode or of business, by or in behalf of the society.

Provided also that where under the rules or by-laws of the society a defaulting member is entitled to be reinstated on payment of arrears, after a stated number of days' default, this section shall not in any wise operate to prejudice the rights of such member. 55 V. c. 39, s. 40 (1),

(2) When the benefit of the contract is stipulated to be suspended or reduced or forfeited for any other reason than for non-payment of premium moneys, or money in the nature thereof, no such additional condition suspending, reducing or forfeiting the benefit shall be valid, unless it is held by the Court, or Judge before whom a question relating to the contract is tried, to be just and reasonable under the circumstances of the case, such decision to be subject to review or appeal.

Provided that in any contract of which total abstinence from intoxicating liquors is made an express condition, such condition shall be deemed to be just and reasonable. 55 V. c. 39, s. 40 (2).

CONTRACTS OF FIRE INSURANCE.

1. General provisions. (All Fire Insurance Companies.)

166.—Every company licensed and registered for the transaction of fire insurance may, within the limits prescribed by the license and registry, insure or reinsure dwelling houses, stores, shops and other buildings, household furniture, merchandises, machinery, live stock, farm produce, and other commodities, against damage or loss by fire or lightning, whether the same happens by accident or any other means, except that of design on the part of the assured or by the invasion of an enemy, or by insurrection. R. S. O. 1887, c. 167, s. 108.

167.—(1) Contracts of fire insurance shall not exceed the term of three years; and the insurance of mercantile and manufacturing risks shall, if on the cash system, be for terms not exceeding one year. R. S. O. 1887, c. 167, s. 106.

Provided that contracts of fire insurance by any mutual or cash-mutual fire insurance company may be for any term not exceeding four years. 52 V. c. 30, s. 1.

(2) Any contract that may be made for one year or any shorter period on the premium note system, or for three years or any shorter period on the cash system may be renewed at the direction of the board of directors by renewal receipt instead of policy, on the insured paying the required premium, or in the case of a contract on the premium note system by giving a new premium note or undertaking; and any cash payments or premium notes for renewal must be made at the end of the year, or other period for which the premium note was granted, otherwise the policy shall be null and void. R. S. O. 1887, c. 167, s. 107; 56 V. c. 32, s. 9 (1).

2. Statutory Conditions and Provisions Relating Thereto.

(Binding all fire insurance contracts whatsoever in Ontario.)

168.—The conditions set forth in this section shall, as against the insurer, be deemed to be part of every contract, (whether sealed, written or oral,) of fire insurance hereafter entered into or renewed or otherwise in force in Ontario with respect to any property therein or in transit therefrom or thereto, and shall be printed on every such policy with the heading *Statutory Conditions*, and no stipulation to the contrary, or providing for any variation, addition or omission, shall be binding on the assured unless evidenced in the manner prescribed by sections 169 and 170. R. S. O. 1887, c. 167, s. 114.

Statutory Conditions.

(1) If any person or persons insures his or their buildings or goods, and causes the same to be described otherwise than as they really are, to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made. R. S. O. 1887, c. 167, s. 114 (1).

(2) After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out, in writing, the particulars wherein the policy differs from the application. R. S. O. 1887, c. 167, s. 114 (2).

(3) Any change material to the risk, and within the control or knowledge of the assured, shall void the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force. R. S. O. 1887, c. 167, s. 114 (3).

(4) If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorized for such purpose, the policy shall hereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death. R. S. O. 1887, c. 167, s. 114 (4).

(5) Where property insured is only partially damaged, no abandonment of the same will be allowed unless by the consent of the company or its agent; and in case of removal of property to escape conflagration, the company will contribute to the loss and expenses attending such act of salvage proportionately to the respective interests of the company or companies and the assured. R. S. O. 1887, c. 167, s. 114 (5).

(6) Money, books of account, securities for money, and evidences of debt or title are not insured. R. S. O. 1887, c. 167, s. 114 (6).

(7) Plate, plate glass, plated ware, jewelry, medals, paintings, sculptures, curiosities, scientific and musical instruments, bullion, works of art, articles of vertu, frescoes, clocks, watches, trinkets and mirrors are not insured unless mentioned in the policy. R. S. O. 1887, c. 167, s. 114 (7).

(8) The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected by any other company, unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected. R. S. O. 1887, c. 167, s. 114 (8).

(9) In the event of any other insurance on the property herein described, having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage without reference to the dates of the different policies. R. S. O. 1887, c. 167, s. 114 (9).

(10) The company is not liable for the losses following, that is to say:

(a) For the loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy. R. S. O. 1887, c. 167, s. 114 (10) (a).

(b) For loss caused by invasion, insurrection, riot, civil commotion, military or usurped power. R. S. O. 1887, c. 167, s. 114 (10) (b).

- (c) Where the insurance is upon buildings or their contents—for loss caused by the want of good and substantial brick or stone chimneys; or by ashes or embers being deposited, with the knowledge and consent of the assured, in wooden vessels; or by stoves or stovepipes being, to the knowledge of the assured, in an unsafe condition or improperly secured. R. S. O. 1887, c. 167, s. 114 (10) (c).
 - (d) For loss or damage to goods destroyed or damaged while undergoing any process in or by which the application of fire heat is necessary. R. S. O. 1887, c. 167, s. 114 (10) (d.)
 - (e) For loss or damage occurring to buildings or to their contents while the buildings are being repaired by carpenters, joiners, plasterers or other workmen, and in consequence thereof, unless permission to execute such repairs has been previously granted in writing, signed by a duly authorized agent of the company. But in dwelling houses fifteen days are allowed in each year for incidental repairs, without such permission. R. S. O. 1887, c. 167, s. 114 (e).
 - (f) For loss or damage occurring while petroleum, or rock-earth or coal oil, camphene, gasoline, burning fluid, benzine, naphtha or any liquid products thereof, or any of their constituent parts (refined coal oil for lighting purposes only, not exceeding five gallons in quantity, or lubricating oil not being crude petroleum nor oil of less specific gravity than required by law for illuminating purposes, not exceeding five gallons in quantity, excepted), or more than twenty-five pounds' weight of gunpowder is or are stored or kept in the building insured or containing the property insured, unless permission is given in writing by the company. R. S. O. 1887, c. 167, s. 114 10 (f).
- (11) The company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion or by lightning. R. S. O. 1887, c. 167, s. 114 (11).
- (12) Proof of loss must be made by the assured, although the loss be payable to a third party. R. S. O. 1887, c. 167, s. 114 (12).
- (13) Any person entitled to make a claim under this policy is to observe the following directions :
- (a) He is forthwith after loss to give notice in writing to the company. R. S. O. 1887, c. 167, s. 114 (13) a.
 - (b) He is to deliver, as soon after as practicable, as particular an account of the loss as the nature of the case permits. R. S. O. 1887, c. 167, s. 114 (13) b.
 - (c) He is also to furnish therewith a statutory declaration, declaring :—
 - (1) That the said account is just and true.
 - (2) When and how the fire originated, so far as the declarant knows or believes.
 - (3) That the fire was not caused by his wilful act or neglect, procurement, means or contrivance.
 - (4) The amount of other insurances.
 - (5) All liens, and encumbrances on the subject of insurance.
 - (6) The place where the property insured, if movable, was deposited at the time of the fire. R. S. O. 1887, c. 167, s. 114 (13) c.
 - (d) He is in support of his claims, if required and if practicable, to produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers; to furnish copies of the written portion of all policies; to separate as far as reasonably may be the damaged from the undamaged goods, and to exhibit for examination all that remains of the property which was covered by the policy. R. S. O. 1887, c. 167, s. 114 (13) d.

(e) He is to produce, if required, a certificate under the hand of a magistrate, notary public, commissioner for taking affidavits, or municipal clerk, residing in the vicinity in which the fire happened, and not concerned in the loss or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has by misfortune and without fraud or evil practice sustained loss and damage on the subject assured to the amount certified. R. S. O. 1885, c. 167, s. 114 (13) *e*.

(14) The above proofs of loss may be made by the agent of the assured, in case of the absence or inability of the assured himself to make the same, such absence or inability being satisfactorily accounted for. R. S. O. 1887, c. 167, s. 114 (14).

(15) Any fraud or false statement in a statutory declaration, in relation to any of the above particulars, shall vitiate the claim. R. S. O. 1887, c. 168, s. 114 (15).

(16) If any difference arises as to the value of the property insured, of the property saved, or of amount of the loss, such value and amount and the proportion thereof (if any) to be paid by the company, shall, whether the right to recover on the policy is disputed or not, and independently of all other questions be submitted to the arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then to two persons, one to be chosen by the party assured and the other by the company, and a third to be appointed by the persons so chosen, or on their failing to agree, then by the County Judge of the county wherein the loss has happened; and such reference shall be subject to the provisions of the laws applicable to references in actions; and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and proportion to be paid by the company; where the full amount of the claim is awarded the costs shall follow the event; and in other cases all questions of costs shall be in the discretion of the arbitrators.

(17) The loss shall not be payable until sixty days after the completion of the proofs of loss, unless otherwise provided for by the contract of insurance. R. S. O. 1887, c. 167, s. 114 (17).

(18) The company, instead of making payment, may repair, rebuild or replace, within a reasonable time, the property damaged or lost, giving notice of their intention within fifteen days after receipt of the proofs herein required. R. S. O. 1887, c. 167, s. 114 (18).

(19) The insurance may be terminated by the company by giving notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium for the unexpired term, calculated from the termination of the notice; in the case of personal service of the notice, five days' notice, excluding Sunday, shall be given. Notice may be given by any company having an agency in Ontario by registered letter addressed to the assured at his last post office address notified to the company, and where no address notified, then to the post office of the agency from which the application was received, and where such notice is by letter, then seven days from the arrival at any post office in Ontario shall be deemed good notice; and the policy shall cease after such tender and notice aforesaid, and the expiration of the five or seven days as the case may be. R. S. O. 1887, c. 167, s. 114 (19).

(a) The insurance, if for cash, may also be terminated by the assured by giving written notice to that effect to the company or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid. R. S. O. 1887, c. 167, s. 114 (19) *a*.

(20) No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company, unless the waiver is clearly expressed in writing, signed by an agent of the company. R. S. O. 1887, c. 167, s. 114 (20).

(21) An officer or agent of the company, who assumes on behalf of the company to enter into any written agreement relating to any matter connected with the insurance, shall be deemed *prima facie* to be the agent of the company for the purpose. R. S. O. 1887, c. 167, s. 114 (21).

(22) Every action or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred, unless commenced within the term of one year next after the loss or damage occurs. R. S. O. 1877, c. 162. Schedule R. S. O. 1887, c. 167, s. 114 (22).

(23) Any written notice to a company for any purpose of the statutory conditions, where the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post letter addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorized agent of the company. 50 V., c. 26, s. 114.

169.—If the insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added on the instrument of contract containing the printed statutory conditions words to the following effect, printed in conspicuous type and in ink of a different colour. R. S. O. 1887, c. 167, s. 115.

Variations in Conditions.

"This policy is issued on the above Statutory Conditions with the following variations and additions :

"These variations (*or as the case may be*) are, by virtue of the Ontario Statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company." R. S. O. 1887, c. 167, s. 115.

170.—No such variation, addition or omission, shall, unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, be legal and binding on the assured; and no question shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, but on the contrary, the policy shall, as against the insurer, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid. R. S. O. 1887, c. 167, s. 116.

Provided it shall be optional with the insurers to pay or allow claims which are void under the 3rd, the 4th, or the 8th Statutory Condition, in case the said insurers think fit to waive the objections mentioned in the said conditions. R. S. O. 1887, c. 167, s. 112.

171.—In case a policy is entered into or renewed containing or including any condition other than or different from the conditions set forth in section 168 of this Act, if the said condition so contained or included is held, by the Court or Judge, before whom a question relating thereto is tried, to be not just and reasonable, such condition shall be null and void. R. S. O. 1887, c. 167, s. 117.

172.—(1) Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this Province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with; or where after a statement or proof of loss has been given in good faith by or on behalf of the assured, in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions or does not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time; or where, for any

other reason, the Court or Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions—no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof (as the case may be) shall, in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into. R. S. O. 1887, c. 167, s. 118.

(2) If in any action or proceeding upon a contract of fire insurance, the assured, being plaintiff in such action or proceeding, has in the opinion of the Court or Judge, wilfully neglected or unreasonably refused to furnish necessary information respecting the property for which the insurance money is claimed, and if as a consequence of such neglect or refusal, the defendant company has been at expense in obtaining information or evidence, the Court or Judge may, in disposing of costs, take into consideration the expense so incurred by the defendant company. 52 V. c. 31, s. 4.

173.—A decision of a Court or Judge under this Act shall be subject to review or appeal to the same extent as a decision by such Court or Judge in other cases. R. S. O. 1887, c. 167, s. 119.

INVESTIGATION OF FIRES.

174.—(1) Any Justice of the Peace, or any one having lawful authority to administer an oath or affirmation in any legal proceeding, may examine on oath or solemn affirmation any party or person who comes before him to give evidence touching any loss by fire in which any fire insurance company is interested, and may administer any oath or affirmation required under this Act. R. S. O. 1887, c. 167, s. 120 (1).

(2) On receiving a written request from any officer or agent of an insurance company with security for the expenses of an investigation, any Justice of the Peace may at once proceed to hold an investigation as to the origin or cause of any fire that has happened within his county or district, and as to the persons, if any, profiting thereby. R. S. O. 1887, c. 167, s. 120 (2).

(3) The Justice of the Peace shall have power to send for persons and papers, and to examine all persons that appear before him on solemn oath or affirmation; and he shall keep a record of all such proceedings, and of all matters received in evidence before him. R. S. O. 1887, c. 167, s. 120 (3); 58 V. c. 34, s. 11 (1).

(4) Any director or officer of the insurance company, or the assured, or any person claiming under the policy, or any person prejudicially affected by any of the evidence so far received, shall have the right to attend personally and by counsel, the investigations or proceedings as party thereto, and to call, examine, cross-examine or re-examine witnesses, as the case may be. 58 V. c. 34, s. 11 (1).

(5) No director or officer of the insurance company, nor any other person interested as hereinbefore mentioned, shall act as magistrate or coroner in any fire investigation; nor shall he act for the magistrate or coroner as clerk, reporter or otherwise, in taking down or recording the depositions or evidence. 58 V. c. 34, s. 11 (1).

(6) The two next preceding sub-sections shall equally apply to all fire investigations held by coroners or Provincial Coroners under any law of the Province. 58 V. c. 34, s. 11 (1).

(7) For purposes of any investigation held under this last section the Provincial Coroner or a Justice of the Peace may summon and bring before him any person whom he deems capable of giving information or evidence touching or concerning the fire, and may examine such persons on oath; and he shall reduce such examinations to writing, and return the same to the clerk of the peace for the district or county within which they have been taken, and the fees payable to a Justice of the Peace in respect of such investigation shall be as herein enacted for a Provincial Coroner. 54 V. c. 37, s. 1 (5).

175.—(1) It shall be lawful for the Lieutenant-Governor in Council to appoint from time to time, under the Great Seal, Provincial Coroners, each of whom shall be by virtue of his appointment both a coroner and a justice of the peace for every county and part of Ontario, for purposes of holding fire investigations. 54 V. c. 37, s. 1 (1).

(2) The fees payable to a Provincial Coroner shall be as enacted by section 7 of chapter 217 of the Revised Statutes of Ontario, 1887. 54 V. c. 37, s. 1 (2).

(3) Before any Provincial Coroner shall enter on any investigation under this Act, he shall obtain the consent in writing of either the Attorney-General or County Attorney for the county wherein the investigation is proposed to be held. 54 V. c. 37, s. 1 (3).

(4) This section shall be construed as one with chapters 80, 83 and 217 of the Revised Statutes of Ontario, 1887.

(5) For purposes of any investigation under section 174 of this section the Justice of the Peace or the Provincial Coroner shall have the same power and authority to require and compel the attendance of witnesses and the production of documents and the giving of evidence as a Justice of the Peace has under articles 590, 581, 582, 583, 584 and 585 of the Criminal Code, 1892.

INSPECTION OF INSURANCE COMPANIES LICENSED BY THE PROVINCE.

176.—(1) The Lieutenant-Governor in Council may appoint an officer to be called the Inspector of Insurance, who shall act under the instructions of the Minister, and his duty shall be to examine and report to the Minister from time to time upon all matters connected with insurance, as carried on by the companies licensed by the Province under this Act. R. S. O. 1887, c. 167, s. 138 (1).

(2) The salary of the Inspector shall be such sum per annum as the Legislature shall from time to time determine; and it shall be lawful to provide from time to time such assistance as may be found necessary. R. S. O. 1887, c. 167, s. 138 (2).

177.—The Inspector shall keep on file the various documents required by this Act to be filed in his office, and shall keep a record of all licenses issued by the Minister. R. S. O. 1897, c. 167, s. 139.

178.—(1) The Inspector of Insurance shall, personally or by deputy, visit the head office of every such company in Ontario at least once in every year, and shall carefully examine the statement of the company as to its condition and affairs, and report thereon to the Minister as to all matters requiring his attention and decision. R. S. O. 1887, c. 167, s. 140 (1).

(2) In order to facilitate the inspection of an insurance company's books and papers, the company may be required by the Inspector to produce, and thereupon the company shall produce the said books and papers at the county town of the county in which the head office of the insurance company is situated, or at such other convenient place as the Inspector may direct. The officer or officers of the company who have custody of the books shall be entitled to be paid by the company for the actual expenses of such attendance. R. S. O. 1887, c. 167, s. 140 (2).

(3) The Inspector shall from such examination prepare and lay before the Minister an annual report of the condition of every company's business, as ascertained from such inspection, and such report shall be published forthwith after the completion thereof. R. S. O. 1887, c. 167, s. 140 (2).

(4) It shall be the duty of the officers or agent of the company to cause their books to be open for the examination of the Inspector, and otherwise to facilitate the examination so far as may be in their power; and the Inspector or deputy aforesaid shall have power to examine under oath any officer or agent of the company relative to its business. R. S. O. 1887, c. 167, s. 141 (1).

(5) A report of all companies so visited shall be entered in a book kept for that purpose, with notes and memoranda, showing the condition of each company; and,

where a special examination has been made, a special written report shall be communicated to the Minister, stating the Inspector's opinion of the condition and financial standing of the company, and all other matters desirable to be made known to the Minister. R. S. O. 1887, c. 167, s. 141 (2).

(6) Every director, officer, manager, agent, collector, auditor or employee of a company who knowingly makes or assists to make any untrue entry in any of the company's books, or who refuses or neglects to make any proper entry therein, or to exhibit the same or allow the same to be inspected and extracts to be taken therefrom shall be guilty of an offence, and the procedure and penalty shall be as enacted in sub-section 6 of section 83 of this Act.

179.—(1) If it appears to the Inspector that the assets of any company are insufficient to justify its continuance of business, or that the company is unsafe for the public to effect insurance with, he shall make a special report of the affairs of the company to the Minister. R. S. O. 1887, c. 167, s. 143 (1).

(2) After full consideration of the report and a reasonable time being given to the company to be heard, and if, after such further inquiry and investigation (if any) as he may see proper to make, the Minister reports to the Lieutenant-Governor in Council that he agrees with the Inspector in the opinion expressed in his report, then, if the Lieutenant-Governor in Council also concurs in such opinion, an Order may issue, suspending or cancelling the license of the company, and prohibiting the company from doing any further business, and thereafter it shall not be lawful for the company to do any further business in Ontario until the suspension or prohibition is removed by the Lieutenant-Governor in Council. R. S. O. 1887, c. 147, s. 143 (2).

180.—Notice of the suspension or cancelling of any license and prohibition from doing any further business, shall be published in the *Ontario Gazette*; and thereafter any person transacting any business in behalf of the company, except for winding up its affairs pursuant to section 7, shall be deemed to have contravened section 85, and shall be liable for each offence to the penalty enacted in the said section. R. S. O. 1887, c. 167, s. 144.

181.—Whenever the affairs of any insurance company doing business in Ontario appear to require the same, the Inspector of Insurance, with the approval of the Minister, may, at the expense of the company, have abstracts prepared of its books and vouchers and a valuation made of the assets and liabilities; and the certificate of the Inspector approved of by the Minister, shall be conclusive as to the expenses to be paid by the company in respect thereof. R. S. O. 1887, c. 167, s. 147.

182.—The Inspector of Insurance, or any officer under him, shall not be interested as shareholders, directly or indirectly, with any insurance company doing business in Ontario. R. S. O. 1887, c. 167, s. 148.

183.—(1) Towards defraying the expenses of the office of the Inspector, a sum not exceeding \$3,000 shall be annually contributed by the companies required to be licensed by the Province under this Act. R. S. O. 1887, c. 167, s. 149 (1).

(2) The amount to be annually contributed by the insurance companies under the provisions of the last preceding sub-section shall be assessed pro rata and based on the gross amount at risk as shown by the books of the several companies on the 31st day of December next preceding. R. S. O. 1887, c. 167, s. 149 (2).

(3) All sums under this Act payable to the Provincial Treasury shall be so paid before the issue of the license, and, in any disputed case, the Minister's certificate, or approval of an account certified by the Inspector, shall as to the amount so payable by each or any company be held conclusive. R. S. O. 1887, c. 167, s. 149 (3).

VOLUNTARY LIQUIDATION OF PROVINCIAL INSURANCE COMPANIES.

184.—(1) When a Provincial Insurance Company other than a Dominion licensee proposes to go into voluntary liquidation, at least one month's notice in advance

shall be given to the Minister and to the Insurance Registrar, and like notice shall also be published by the company in two consecutive issues of the *Ontario Gazette*, and in some other newspaper should the Registrar so require; and the notice shall state the date at which contracts shall cease to be taken by the company, also the name and address of the company's liquidator, or the intention of the company to apply on a stated day for the appointment of a liquidator. R. S. O. 1887, c. 167, s. 151.

(2) At the winding up of a Provincial Mutual or Cash-Mutual Fire Insurance Company, after notice has been given as required by sub-section 1, it shall be lawful for the directors of said company to re-insure out of the reserve or surplus funds the unexpired contracts for which premiums or premium notes have been taken. R. S. O. 1887, c. 167, s. 152 (1).

(3) The said reinsurance shall be effected in some company registered to transact business in the Province and approved by the Minister. R. S. O. 1887, c. 167, s. 152 (2).

(4) When any company is wound up each person contracted with on the cash plan shall be entitled to a refund from the company for the unearned proportion of the cash premium calculated from the date at which the company, according to the notice in sub-section 1, ceased to undertake contracts; but this shall not destroy or defeat any other remedy such person may have against the company in respect thereof or for any other cause. R. S. O. 1887, c. 167, s. 153.

(5) Every receiver (including therein every liquidator or assignee) of a Provincial Insurance Company other than a Dominion licensee, shall, forthwith, give such bonds or securities for his fidelity as would be required of a receiver under section 188; and in case of dispute or doubt, the Master-in-Ordinary upon motion of any creditor or person interested, or of the Insurance Registrar, shall conclusively determine the kind and amount of such bonds or securities. The bonds or securities given by any receiver shall be made and deposited as enacted in subsection 9 of the said section.

(6) Every liquidator or receiver under this section shall (until the affairs of the company are wound up and the accounts are finally closed) within seven days after the close of each month, file with the Court or other authority appointing him, and also with the Insurance Registrar, detailed schedules showing, in such form as may be required, receipts and expenditures, also assets and liabilities, and he shall, whenever by the authority appointing him, or by the Insurance Registrar so required to do, exhibit the company's books and vouchers, and furnish such other information respecting the company's affairs as may be required; and any receiver, assignee or liquidator refusing or neglecting to furnish such information, shall, for each offence, be subject to a penalty of not less than \$50 nor more than \$200, to be recovered on behalf of Her Majesty for the use of this Province; and he shall in addition render himself liable to be dismissed or removed. R. S. O. 1887, c. 167, s. 154.

VOLUNTARY LIQUIDATION OF FRIENDLY SOCIETIES, OR OF THE INSURANCE FUNDS THEREOF: DISSOLUTION BY A SOCIETY OF ITS SUBORDINATE BRANCHES OR LODGES; AMALGAMATION OF BRANCHES OR LODGES.

185.—(1) Any registered friendly society (being a Provincial corporation), or any insurance fund thereof, may be voluntarily wound up after resolution (hereinafter called the winding-up resolution) passed in that behalf in a general meeting, ordinary or special, after at least one month's notice of such intended resolution. Such resolution may be assented to and filed as provided in subsection 3 of section 163, and, after such assent and filing, the resolution shall have the same legal effect as therein enacted. Such resolution may provide for the transfer of the liabilities and assets of the society or of the fund to some other corporation.

(2) Where there are assets to be realized, distributed, disposed of or dealt with, the winding-up resolution shall appoint a competent and otherwise suitable person as liquidator, and shall fix the amount of his bonds (which shall be of sufficient amount for the purposes of liquidation), and shall state the amount and form of his compensation. Unless otherwise provided in the winding-up resolution, the then executive officers (other than such one, if any, of the number as is appointed liquidator) shall act as a committee of inspection and shall audit the liquidator's accounts at least once a month until his accounts are closed, and shall certify their audit.

(3) Preliminary to any winding up or transfer under this section, there shall be filed with the Insurance Registrar a statement made by one or more of the executive officers of the society or fund, declaring, upon oath, the facts and circumstances of the case, and annexing to the statement as exhibits a true copy of the winding-up resolution, and also a financial statement showing in such form as shall be required the liabilities and assets of the society or of the fund: such other information then and from time to time during the winding up shall be furnished as the Insurance Registrar shall require, and the provisions of subsections 5 and 6 of section 184 shall equally apply to a liquidator under this section.

(4) Where, in such a society as mentioned in subsection 1, endowment or expectancy insurance is transacted and there exists an endowment fund separate and distinct from the life insurance fund, then, by a resolution passed by a majority of the persons assembled in a general meeting, ordinary or special, after at least one month's notice of such intended resolution, the society may determine that the endowment or expectancy insurance shall be discontinued, and that the endowment or expectancy fund shall be distributed pro rata among the members then in good standing (contributors to such fund) according to the total contribution of each such member to the fund. After the resolution has been assented to and filed, as provided in sub-section 1, the executive officers of the society may proceed to ascertain the persons legally entitled to rank upon the fund, and may distribute the fund among those so entitled; and such distribution shall discharge the society and all executive officers thereof from all further or other liability in respect of such fund and in respect of endowment or expectancy contracts undertaken by the society.

(5) In such case as mentioned in sub-section 4, if all the members interested in the endowment or expectancy fund are also interested as holders of life insurance contracts, then the general meeting of the majority of the members present thereat, instead of determining that the endowment or expectancy fund shall be distributed, may determine that such fund shall be converted into, or merged in a life insurance fund; and after the said resolution has been assented to and filed as provided in subsection 1, the endowment or expectancy fund shall be deemed to have become and to be a life insurance fund.

(6) After the passing of such a resolution as mentioned in subsection 4 or subsection 5, it shall be unlawful for the society thereafter to undertake or transact any endowment or expectancy insurance whatsoever.

(7) If the registered society shall at any time revoke the warrant or charter under which a subordinate branch or lodge is operated (whether such branch or lodge is incorporated or not) such revocation shall be certified in duplicate by the presiding officer and the secretary of the society under the seal thereof; one of the said duplicates shall be filed with the Registrar of Friendly Societies, the other with the Provincial Registrar; and this certificate from the filing thereof in the office of the Provincial Registrar, shall, *ipso facto*, operate to dissolve the subordinate branch or lodge, and to vest its property, assets, funds and effects in the presiding officer and the secretary of the registered society and their successors in office, as trustees for the creditors and persons beneficially entitled; and the surplus (if any) after the liabilities are satisfied, shall vest in the registered society to its own use absolutely. 56 V. c. 32, s. 4 (2).

(8) A registered society organized on the lodge plan may by a general or special by-law or by-laws provide for the amalgamation of two or more of its subordinate

branches or lodges, and for the transfer of its liabilities and assets to the new or continuing branch or lodge.

(9) In any winding up, transfer or dissolution under this section, or under section 184, if doubts, difficulties or disputes arise as to any matter whatsoever, the Insurance Registrar or the liquidator, or any of the committee of inspection, or any person interested in the estate may apply to the Master-in-Ordinary who shall finally dispose of the matter; and the said Master may on the motion of any of the said persons remove the liquidator and appoint another liquidator, or do any other matter or thing which the Master might do in the winding-up begun or proceeding under sections 186 to 196 of this Act; or upon the motion of the said persons or of the said committee, the said Master may by order remove into his office the winding up, transfer or dissolution which shall thereafter proceed as if begun or proceeding under the said sections.

(10) The duration of any winding-up under this section shall not be prolonged beyond the period mentioned in sub-section 4 of section 191, all the provisions of which sub-section shall equally apply to a liquidator under this section.

(11) For purposes of any motion or other proceeding under this section or section 184, it shall be sufficient to entitle the proceeding as in the matter of this Act and of the Insurance corporation or fund concerned; and at least two clear days' notice of motion shall be given unless otherwise directed by the said Master.

COMPULSORY LIQUIDATION OF INSURANCE CORPORATIONS.

186.—(1) Sections 187 to 196 inclusive shall apply to Provincial insurance corporations other than those being wound up under sections 184 and 185, and other than licensees of the Dominion of Canada within the meaning of section 59. 50 V. c. 39, s. 52 (1).

Provided that where the corporation is not constituted exclusively or chiefly for insurance purposes, and the insurance branch and fund are completely severable from every other branch and fund of the corporation, then the word "corporation" for purposes of sections 187 to 196 inclusive, means only the insurance branch of the corporation. 55 V. c. 34, s. 6 (10).

(2) To such corporations the said sections shall equally apply where the accounts, account books, and insurance fund are in the charge, custody, possession or power of two or more persons; and in such case the words "receiver" and "interim receiver" shall include all of such persons unless and until other appointment or other disposition of the matter is made by the Court. 55 V. c. 39, s. 52 (2).

(3) The winding up of any corporation under this Act shall be deemed to commence at the beginning of the day on which the corporation became unregistered in terms of section 76; and when the corporation is constituted for the transaction of insurance exclusively, its corporate powers shall *ipso facto* cease and determine except for the sole purpose of winding up its affairs. 58 V. c. 34, s. 6 (10).

(4) After the date of the commencement of the winding up, any transfer of shares unless made by authority of the High Court, or any alteration in the status of members of the corporation shall be void; and no suit, action or other proceeding shall be proceeded with or commenced against the corporation except by leave of the Court and subject to such terms as the Court imposes; and every attachment, sequestration, distress or execution put in force against the estate of the corporation shall be void. 58 V. c. 34, s. 6 (10).

(5) All contracts of employment entered into by the corporation shall *ipso facto* cease and determine at the commencement of the winding up. 58 V. c. 34, s. 6 (10).

(6) In any winding up under this Act all the funds, assets and property of the liquidating corporation or any liquidating branch or lodge thereof shall be deemed general assets of the liquidating corporation, branch or lodge, respectively, for the payment of all debts of the corporation, branch or lodge respectively, and are not to be applied to the payment of any particular debts, preferentially or exclusively, except as otherwise herein expressly enacted. 58 V. c. 34, s. 6 (10).

187.—(1) Upon the happening of any of the events mentioned in subsection 1 of section 76, or upon notice given by the Insurance Registrar of the corporation's registry being cancelled, or where a corporation after the 31st December, 1892, neglects to register or renew its registry, the treasurer or other officer of the corporation in Ontario having in his charge, custody, possession or power the accounts, account books and insurance funds of the corporation shall *ipso facto* and during the pendency of an action or appeal if any, become interim receiver for the corporation and an officer of the High Court subject to its control and direction, and shall so remain unless and until other appointment or other disposition of the matters is made by the Court. 55 V. c. 30, s. 53 (1).

(2) Every receiver (including interim receiver) shall be subject to the summary jurisdiction of the Court, in the same manner, and to the same extent, as the ordinary officers of the Court are subject to its jurisdiction; and the performance of his duties may be compelled, and all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property, upon, in or to any effects or property, in the hands, possession or custody of a receiver, may be obtained by an order of the Court on summary petition, and not by action, suit, attachment, seizure or other proceeding of any kind whatsoever; and obedience by the receiver to such order may be enforced by the Court under the penalty of imprisonment, as for contempt of court, or disobedience thereto; and in the discretion of the Court he may be removed, and with or without removal of the receiver, the Court may order the amount of any damage, loss or costs, ascertained to have been occasioned to the estate by his misconduct, misfeasance, laches or neglect, to be deducted from his remuneration earned, or to be paid by him or his sureties. 58 V. c. 34, s. 6 (11).

(3) The interim receiver shall forthwith deposit in the chartered bank prescribed by rules 163, 164 and 165 of the Consolidated Rules of Practice of the Supreme Court of Judicature, all moneys and securities for money in the charge, custody, possession or power of the corporation or of himself as officer of the corporation, and from time to time so deposit all further moneys and securities that come into his possession or power as receiver, unless and until otherwise ordered by the Court. 55 V. c. 30, s. 53 (2).

(4) On receiving from the interim receiver the moneys and securities for money of the corporation, together with his written notice that by virtue of this Act, the insurance corporation (*naming it*) has become unregistered, and that he is interim receiver for the same, the bank shall give the interim receiver a receipt for the moneys, and a separate receipt for the securities, specifying each security, each receipt being in triplicate; and the said receipts shall acknowledge the moneys and the securities respectively to have been deposited by the interim receiver (*naming him*) to the credit of the unregistered insurance corporation (*naming it*), and as subject to the order of the High Court, and such moneys and securities when so deposited shall be held to be deposited to the joint credit of the said unregistered corporation and of the Accountant of the Supreme Court of Judicature for Ontario. 55 V. c. 30, s. 53 (3); 58 V. c. 34, s. 6 (12).

(5) The payment of interest on the moneys so deposited in the bank shall be governed by the same rules as in the case of money received by the bank to the credit of a cause. 55 V. c. 30, s. 53 (4).

(6) Notice from the Insurance Registrar to any person or corporation that the registry of an insurance corporation has become unregistered, is sufficient notice that the funds and securities of the unregistered corporation are subject solely to the order of the High Court. 58 V., c. 34, s. 6 (11).

188.—(1) After depositing the moneys and securities in the bank as required by sub-section 3 of section 187, the interim receiver shall forthwith file an application in the office of the Master to the following effect :

The Ontario Insurance Act, 1897.

In the High Court of Justice,

In the matter of (*name of corporation*), an unregistered insurance corporation, I, C. D., by virtue of *The Ontario Insurance Act, 1897*, (or of order made thereunder, *as the case may be*) interim receiver for the above-named corporation, do on the grounds set forth in the annexed affidavit apply to the Court for confirmation of me in my office of receiver (or for discharge of me from my office of receiver, *according as the interim receiver applies to be confirmed or discharged*), and for an appointment of a day on which my application shall be considered.

Dated at this day of 18

C. D.

55 V. c. 39, s. 54 (1).

(2) Together with the foregoing application the interim receiver shall file in the office of the Master one of each of the triplicate receipts given by the bank as aforesaid, and also an affidavit to the following effect, the necessary variations being made where by operation of this Act, two or more persons are made interim receiver, and join in the affidavit, and the interim receiver shall forthwith deliver another of the triplicate receipts to the Accountant of the Supreme Court of Judicature for Ontario, at Osgoode Hall, Toronto. 55 V. c. 39, s. 54 (3); 58 V. c. 34, s. 6 (13).

The Ontario Insurance Act, 1897.

In the High Court of Justice,

In the matter of (*name of the corporation*) an unregistered insurance corporation and the application of C. D., interim receiver, bearing date the day of 18

I, C. D., by virtue of *the Ontario Insurance Act, 1897*, interim receiver (*naming the corporation*) make oath and say :

1. That the (*naming the corporation*) ceased to be registered under *The Ontario Insurance Act, 1897*, on the day of 18 , and that thereupon by virtue of the said Act I became interim receiver for the said corporation.

2. That when the said corporation so ceased to be registered, I held therein the office of treasurer (*or as the case may be*) and that as such officer I had in my custody, possession or power the funds (*or if a corporation having funds separate and distinct from the funds of the insurance branch, then say insurance funds*) of the corporation.

3. That all the moneys and securities for money in my custody, possession or power when the said corporation ceased to be registered or subsequently and up to the time of making deposit in the bank as required by the said Act, are fully and truly set out in the schedule A to this my affidavit; also that the said deposit thereof is correctly vouched for by the bank's receipts hereto annexed.

4. That the other assets of the said corporation, including moneys or securities for money that have come into my charge, custody, possession or power since the time of making the said deposit, are fully and truly set out in the schedule B to this my affidavit.

5. That as treasurer (*or other officer, as the case may be*) of the said corporation, I gave securities for the faithful performance of my duties to the corporation, as follows :

(*Here specify the securities given; if bonds, give names and addresses of the sureties and the sums in which they are severally bound.*)

6. That the said securities are still in force and are now in the custody, possession or power of (*here give the name and address of the custodian or bailee*).

7. That I have filed herewith an application in the Master's office, praying the

Court to confirm me in my office as receiver (or to discharge me of my office as receiver, *as the case may be*), and that the following are the material facts in support of the said application (*here state shortly the material facts*).

Sworn at day of 18 } Signature.
this before me, etc.

55 V. c. 30, s. 54 (3).

(4) Such affidavit may be sworn to before any person duly authorized to administer oaths in any legal proceeding. 55 V. c. 30, s. 54 (4).

(5) Until the interim receiver is discharged of his office, or until new securities are taken from him by order of the Court, the securities given by him to the corporation and in force at the cesser of registry, shall continue in as full force and validity as if the corporation had continued to be registered. 55 V. c. 30, s. 54 (5).

(6) On the filing of the documents specified in this section, the Master shall issue to the interim receiver his certificate of the filing, and shall issue his order to the person or persons having in his or their charge, custody, possession or power the securities mentioned in the next preceding subsection, to deliver the same forthwith at the Master's office to be filed, and on any refusal, neglect or delay to obey the order, such person or persons shall be liable to be committed for contempt of court, as provided in sections 187 and 190. 55 V. c. 30, s. 54 (6).

(7) If no such securities as mentioned in sub-section 5, or if the existing securities are not in the opinion of the Master satisfactory or sufficient, the Master may order the interim receiver within a time limited to give securities or to give other or additional securities; and on the interim receiver's default of compliance, the Master may remove him and appoint another interim receiver. 55 V. c. 30, s. 54 (7).

(8) The Master may accept as the receiver's security the bond of any guarantee company duly registered under this Act. 55 V. c. 30, s. 56 (3).

(9) The bonds, guarantee policies or other securities of every receiver under this Act are to be made to the Insurance Registrar, and when approved by the Master, are to be transferred to the Insurance Registrar to be deposited and remain in the same custody as securities deposited by insurance companies under this Act. 58 V. c. 34, s. 6 (14).

(10) For the purposes of holding the securities of receiver, and all estate therein, to the use of the unregistered corporation, the Insurance Registrar shall be a corporation sole, by the name of "Insurance Registrar for Ontario," and the said Registrar as such corporation sole, shall have perpetual succession, and may sue and be sued, may plead and be impleaded in any of Her Majesty's Courts in this Province. 58 V. c. 34, s. 6 (14).

(11) All securities heretofore made under this Act to any person or persons, other than the Insurance Registrar and in force at the passing of this subsection, shall forthwith be assigned and transferred to the Insurance Registrar, to be deposited and remain in the same custody as prescribed by subsection 9 of this section. 58 V. c. 34, s. 6 (14).

189.—(1) The Master in and by the certificate of filing mentioned in sub-section 6 of section 188, or by *ex parte* order or otherwise, may appoint a place and a time, such time being not less than twenty-one days from the date of the certificate or order, at which time he will hear the application of the interim receiver and will confirm the interim receiver in his office, or appoint another receiver, or make such other disposition of the matter as shall appear proper. 55 V. c. 30, s. 55 (1).

(2) Public notice shall be given by the interim receiver of his application and of the place and time appointed by the Master for the hearing of the same; such notice shall be published in two issues of the *Ontario Gazette*, and once a week for two weeks in a newspaper published in the county where the head office or chief office of the unregistered corporation is situated, and a copy of the notice shall be delivered

to the Insurance Registrar at his office, at least ten days before the day appointed for the hearing of the application, and the notice shall be to the following effect:—

The Ontario Insurance Act, 1897.

In the High Court of Justice

In the matter of the (*naming the corporation*) an unregistered insurance corporation.

TAKE NOTICE that C. D., interim receiver of the said corporation, has filed in the Master's office at _____ an application to be confirmed in his office (*or to be discharged of his office*) as receiver, and that the Master has appointed (*place, day and hour*) for the hearing of the said application, at which place and time the Master will make such disposition of the matter as shall appear proper.

Dated at _____ the _____ C. D.
day of _____ 18 ____
55 V. c. 39, s. 55 (2).

190.—(1) If the person or persons made interim receiver by this Act or by order hereunder, fail to comply with the provisions of section 187 within eight days after becoming interim receiver, then the Insurance Registrar or any policy holder, or certificate holder, or any claimant or creditor may on motion, supported by an affidavit declaring the facts, move the Master to issue his certificate of default, and may by the same or subsequent motion, move the Master to appoint an interim receiver, and to appoint a place and time for confirming such interim receiver in his office, or for disposing of the matter otherwise, and upon such motion or motions the Master may issue his certificate of default, and may appoint an interim receiver and make such further orders as seem necessary or expedient for securing the property of the corporation. 55 V. c. 39, s. 57 (1).

(2) An interim receiver appointed by the Master shall under the direction of the Master, take immediate possession of the moneys and securities for moneys of the corporation, and shall thereafter perform all the duties required of an interim receiver by this Act, and on default of performance shall be liable to the penalties imposed by this Act. 55 V. c. 39, s. 57 (2).

(3) On any non-compliance by an interim receiver or by any officer, agent or employee of the corporation with any provision of sections 187 and 188 or with any order made, or summons or direction issued by the Master under this Act, then upon motion as enacted in sub-section 1 of this section, any of the persons therein mentioned may move the Master to issue his certificate of the default, and his certificate shall be conclusive evidence of such default for purposes of any proceedings taken by any of such persons, under sections 187 and 188, or under sub-section 5 of this section. 55 V. c. 39, s. 58 (1).

(4) A motion to commit such defaulter may on two clear days' notice be made before a Judge of the High Court in Chambers. 55 V. c. 39, s. 58 (2).

(5) If any person or persons made interim receiver by this Act or by order hereunder, receive from the Insurance Registrar notice under his hand and the seal of his office directing such person or persons to comply with the provisions of section 187, or of section 188, and if the person or persons so notified shall not within ten days after the notice delivered comply accordingly, such person or persons shall each and every of them be guilty of an offence, and upon summary conviction thereof before any Police Magistrate or Justice of the Peace having jurisdiction where the offence was committed, be liable to a penalty not exceeding \$500 and costs and not less than \$100 and costs, and in default of payment the offender shall be imprisoned with or without hard labour for a term not exceeding three months and not less than one month; and, on a second or any subsequent conviction, he shall be imprisoned with hard labour for a term not exceeding twelve months and not less than three months. 55 V. c. 39, s. 59 (1).

(6) All the provisions contained in sub-sections 3, 4 and 6 of section 85 shall apply equally in the case of an offence committed under this section. 55 V. c. 30, s. 50, (2).

(7) The provisions contained in section 74 shall apply equally to evidence in any cause, matter, proceeding or trial, arising under or out of this section. 55 V. c. 30, s. 55 (3).

191.—(1) At the place and time appointed for hearing the application mentioned in section 188 the Master may confirm the interim receiver in or discharge him of his office, and may appoint another person to be receiver, or with the consent in writing of the Insurance Registrar, may then or afterwards dispense with a receiver, and generally, may make then or afterwards, such disposition of the matter as will best expedite the beneficial realization of the assets, the discharge of the liabilities, and the distribution of the surplus among the persons entitled. Provided that, where there is no receiver, the procedure shall, as nearly as may be, conform to the procedure herein prescribed for winding up with a receiver; and the assets shall be realized and distributed by or under the direction of the Master among the persons entitled thereto, in the same way, as nearly as may be, as if the distribution were being made by the receiver; a Judge of the High Court may make an order directing how the books, accounts and documents of the corporation and of the receiver are to be disposed of, and may order that they be deposited in Court, or otherwise dealt with as may be thought fit. Provided also that in any case there shall not be more than one receiver at any one time, except with the consent in writing of the Insurance Registrar. 55 V. c. 30, s. 56 (1); 58 V. c. 34, s. 7 (1).

(2) The Master may appoint as receiver any trusts company approved by the Lieutenant-Governor in Council and accepted by the High Court as a trusts company. 55 V. c. 30, s. 56 (4).

(3) Subject to the provisions hereinafter contained, the Master shall decide upon the security or securities to be given by the receiver, upon the mode and amount of his compensation; shall fix the times for the submission and passing of his accounts; shall settle advertisements deemed to be necessary; shall determine what persons are entitled to notice of any matter or proceeding, and the time, mode and form of notice to be given; shall settle and determine lists of the debtors and the contributories and the amounts which they are respectively liable to pay and contribute to the assets of the estate; and shall also settle and determine the claims of creditors, and the amounts to which they are respectively entitled, and all matters of set-off affecting or alleged to affect such debts, contributions or claims; shall direct the realization of assets, the discharge of liabilities and the distribution of the surplus; and shall make such orders and issue such directions as shall best effectuate the provisions of this Act; and generally shall have all the powers which might be exercised on any reference to him under a judgment or order of the High Court. Orders and certificates made by the Master under this Act, shall be appealable to a Judge of the High Court in like manner as other orders and certificates of the Master, and so far as not inconsistent with the provisions of this Act, the rules of the Supreme Court of Judicature shall apply to all proceedings under this Act. 55 V. c. 30, s. 56 (2) (5) (6); 58 V. c. 34, s. 7 (2).

(4) In fixing the receiver's remuneration his efficiency and expedition in winding up shall be considered; in no case shall the winding up be prolonged beyond the space of one year from the commencement, except for special and urgent cause shown to the satisfaction of the Insurance Registrar, and when prolonged beyond the said period for such cause so shown the Insurance Registrar by a consent in writing shall limit a day for the final closing of the books and accounts of the estate. Where the creditors are subjected to delay or the estate to expense by any want of care, diligence or efficiency in the receiver, the Master or a Judge in Chambers on an appeal from the Master, on motion of the Insurance Registrar or of any creditor, contributory or other person interested in the estate may impose a fine on the receiver of not less than \$20 nor more than \$200 and costs, which thereupon shall be

deemed to be a debt adjudged due from the receiver to the estate, and execution may issue forthwith or the amount may be charged against any remuneration already earned by but not yet paid to the receiver. 58 V. c. 34, s. 7 (2).

(5) Under the direction of the Master the receiver shall as far as practicable, act personally in all matters relating to the estate, shall attend on correspondence, give notices, file or copy documents, prepare schedules, make calls on persons found or adjudged subject thereto, and shall personally perform such other duties and services in the receivership as shall from time to time be proper and necessary in the business of the receivership; and no costs shall be paid or allowed for the performance of duties or services which properly devolve upon the receiver personally, either within the intent of this Act or by virtue of any law or practice relating to receivers in force in Ontario. 58 V. c. 34, s. 7 (3).

192.—(1) The advertisement for or notice to creditors or claimants shall be to the effect of the form in Schedule B. hereto. 58 V. c. 34, s. 7 (3).

(2) Upon the evidence mentioned in sub-section 10 of section 74 of this Act, (unless upon error shown to the satisfaction of the Master), and without the creditor or claimant filing further or other proof or making any formal claim or giving notice, the receiver shall prepare each in duplicate the three several schedules next hereinafter mentioned with the amount for which or having relation to which each creditor or claimant appears entitled to rank on the assets. Upon the said several amounts being verified to the satisfaction of the Master, and in the absence of contestation by any person interested, or party, the creditor or claimant shall be collocated and ranked accordingly. 58 V. c. 34, s. 7 (3).

(3) The first of the said three schedules may be described as the *Schedule of Preferred Creditors*. This schedule shall include the names, addresses and descriptions of the persons mentioned in sub-section 7 of section 196 hereof, together with the total amount to which, on the aforesaid evidence, (particular reference being made to the book and page, or as the case may be) the said persons are severally entitled, together also with the amount in respect of which they are severally entitled to rank as preferred creditors. 58 V. c. 34, s. 7 (3).

(4) The second of the said schedules may be described as the *Schedule of Ordinary Creditors*. The schedule shall include those preferred creditors who, in respect of an unpreferred residue, are entitled to rank as ordinary creditors and the amount in each case of such residue; also all creditors entitled to claim under policies matured before the commencement of winding up, or under policies having at that date a fixed surrender value, or under policies unmatured at the commencement of the winding up, but secured by deposit under this Act, together with the following particulars in the case of each policy, viz.: The number and description of the policy, the date of issue (and in the case of any life insurance policy, the age of the assured at date of issue) the name and address of the assured, and of his assignee, if any, the amount for which the policy was issued and the value of the policy or of the unearned premiums, as the case may be, taken as at the commencement of the winding up, and in the case of policies issued for a term of years, the date of the expiry of the term. The said second schedule shall further include particulars of the several obligations other than policies issued by the corporation and outstanding at the commencement of winding up, with the names of the obligees and payees, and the value of the said obligations taken as at that date, and shall also include the names and addresses, so far as known, of all other persons entitled to rank upon the assets not being persons and claims falling within the scope of the first and third of these schedules. 58 V. c. 34, s. 7 (3).

(5) The said third schedule may be described as the *Schedule of Unmatured and Unsecured Policies*. This schedule shall include all policies in force at the commencement of winding up, but not falling within the scope of the said second schedule, and shall furnish the like particulars as therein mentioned, except as to the value of the policy, and shall further show the aggregate of the contributions

made by the assured to the reserve or surplus fund, if any, of the corporation; and in any distribution of any surplus assets the distributive share under any policy shall be proportionate to the said aggregate of contributions by the assured, with or without interest thereon, as the Master under the circumstances shall deem to be just; provided that when the registry of the corporation was cancelled for insolvency or impending insolvency, or where the Master is of opinion that the assets of the estate are insufficient or not more than sufficient to pay in full the claims entitled to be ranked in the said first and second schedules, the Master may dispense with the preparation of the said third schedule. 58 V. c. 34, s. 7 (3).

(6) As soon as may be after the commencement of the winding up the receiver shall prepare *Schedules of Debtors and Contributories*. The *Schedule of Debtors* shall show the names and addresses (so far as the addresses can be ascertained) of all persons actually indebted to the estate or against whom the estate holds obligations or accounts accruing due with particulars of the same, and of the securities if any held by the estate, reference being in every case made to the books, or other evidentiary matter in the hands of the estate. The *Schedule of Contributories* shall show the names and addresses (so far as the addresses can be ascertained) of all members of the corporation and persons who are subject to call, or otherwise liable to contribute to the assets of the estate, and the extent of such liability, giving the like reference to evidence. 58 V. c. 34, s. 7 (3).

(7) The several schedules in this sub-section mentioned shall be prepared by the receiver in triplicate; one of the triplicates verified by his oath shall be filed in the Master's office; another shall be delivered to the Insurance Registrar; and the third shall be kept in the receiver's office, and made accessible on demand to all persons interested in the estate. 58 V. c. 34, s. 7 (3).

193.—(1) After the expiration of the time limited by the advertisement for creditors or notice to claimants, the Master shall then proceed without delay to settle and determine the list of creditors and the claims of alleged creditors, and the amounts to which those persons by him adjudged to be creditors are respectively entitled; also to settle and determine the lists of debtors and contributories and the amounts they severally are liable to pay or contribute to the assets of the corporation; also to settle and determine all matters of set-off affecting or alleged to affect such claims against, or debts or contributions to the estate. The Master shall have authority to disallow and exclude all claims of which notice was not given within the time limited; and thereafter he shall report directing a distribution of the assets among the persons entitled thereto, having regard only to the claims of which the receiver had notice within the time limited; but it shall also be competent for the Master to make an interim report or reports whenever deemed advisable; and, when deemed necessary, to direct the payment of an interim dividend or interim dividends. It shall not be necessary or advisable to procure an order for the payment out of court of any dividend declared by the Master's report, after the said report becomes absolute or confirmed by lapse of time or is affirmed on final appeal as the case may be. Such payment out shall be made by the Accountant of the Supreme Court of Judicature upon the production of the report with a certificate by the said Master, certifying the date of the filing and that the said report has become absolute, or has been affirmed on final appeal as the case may be. 58 V. c. 34, s. 7 (3).

(2) Where, in the course of winding up a corporation under this Act, it appears to the Master or to the Insurance Registrar that any past or present trustee, auditor, director, manager, officer, official, receiver or liquidator of the corporation has misapplied or retained in his own hands or become liable or accountable for any money, assets, or property of the corporation, or has been guilty of any misfeasance or breach of trust or duty in relation to the corporation, or whose conduct in the management of the affairs of the corporation has been such as in the opinion of the Insurance Registrar to require investigation, the Master, on the application of the Insurance Registrar, and after at least ten days' notice served on the person or on the several

persons whose conduct or dealings are to be investigated, shall, and is hereby authorized and empowered, notwithstanding that the offence is one for which the offender is criminally responsible, to examine into the conduct and dealings of the said person or persons, and report to the court his conclusions upon the evidence; and where the Master by his report finds as a fact that such default or misfeasance has been committed, and ascertains the loss to the estate thereby, ascertains the person or persons who committed the act or acts of default or misfeasance, or breach of trust or duty, the Master by his report may direct the said person or persons severally or jointly, or jointly and severally to pay to the estate a certain sum or sums of money with or without interest, and with costs, if any, occasioned by the default, misfeasance or breach of trust or duty, or the Master may by his report disallow any account that such defaulter or misfeasant may have for his services or salary, and the report of the Master when made shall be subject to the provisions of this Act as to filing, confirmation and enforcement. 56 V. c. 34, s. 7 (3).

194.—(1) Where any report is made by the Master, he shall deliver out his report to the receiver, and the receiver shall forthwith file the same in the Master's office, or if the matter or proceeding is in Toronto, or the county of York, then in the proper office at Osgoode Hall; and thereupon in the *Ontario Gazette* and in a newspaper issued at or nearest the place where the head office of the unregistered corporation is situate, the receiver shall give notice of the date of filing; the receiver shall also forthwith deliver a copy of the report to the Insurance Registrar and notice of the day of filing; the receiver shall also keep in his own office a copy of the report endorsed with the date of filing, and make the same accessible on demand to all persons interested in the estate. 58 V. c. 34, s. 7 (3).

(2) Upon any report of the Master (or the said report as amended on appeal, if any) becoming absolute under the rules of the Court, every person ascertained by the report to be indebted in a specified sum to the estate of the corporation shall *ipso facto* and without further proceedings, and as after final judgment be deemed and be debtor to estate in the sum specified, and thereafter the Master may under his hand certify that by his report dated _____ and filed in _____ on the _____ day of _____ 18 (supplying the necessary particulars) the person or persons named in the certificate has or have been found indebted to the estate of the unregistered corporation (naming it) in the sum of \$ _____ with \$ _____ interest (if any) and \$ _____ costs (if any). 58 V. c. 34, s. 7 (3).

A fee of 25 cents shall be payable to a Local Master in respect of each certificate under this subsection.

(3) The receiver or the Insurance Registrar thereupon by precept or requisition directed to the clerk of any Division Court or County Court, or to the proper registrar or his deputy in the High Court, may require the said certificate to be entered as a judgment of the Court, and thereupon it shall be entered accordingly, and thereafter the receiver or the Insurance Registrar may take any proceedings or process for the enforcing and collecting judgment that could be had or taken for the like purpose upon any judgment of the said Court.

(4) When the Master finds that certain contributories or other persons liable to pay to the estate any sum of money, damages or costs, reside within the county or bailiwick of any sheriff, he may direct one writ of execution to issue, commanding the sheriff to execute the said writ against the goods and chattels or lands and tenements of each of the persons named therein in respect of the sum of money, damages or costs specified as payable by each of the said persons respectively, and thereupon the sheriff shall proceed to execute the said writ of execution as he would if separate writs of execution for the sum of money, damages or costs has been issued against each of the said persons respectively. 58 V., c. 34, s. 7 (3).

(5) Any purchase of assets of the unregistered or liquidating corporation, or of any member's right to rank on the assets, or of a member's dividend by any person directing, managing, auditing, or employed by the corporation within three years

next before receivership or liquidation, or any such purchase by any receiver, or liquidator or inspector of the estate is hereby absolutely prohibited, and any pretended purchase or assignment such as aforesaid shall be utterly void. This sub-section shall apply also to any winding up of an insurance corporation under chapter 183 of the Revised Statutes of Ontario, 1887, or under any other Act of the Province.

195.—(1) The books, financial statements, schedules, accounts and vouchers of every receiver under this Act shall be accessible to the Insurance Registrar, or to any person authorized under his hand and seal, as enacted by section 82, and if any receiver refuses or neglects to afford such access, or if he makes a wilfully false statement or untrue entry, he shall be guilty of an offence as against sub-section 6 of section 83, all the provisions of which sub-section shall equally apply in the case of an offence committed against this sub-section. 55 V. c. 39, s. 56 (7); 58 V. c. 34, s. 7 (4).

(2) Unless and until otherwise ordered by the court, the receiver shall forthwith deposit in the bank prescribed by sub-section 3 of section 187, to the credit of the unregistered insurance corporation all moneys by him from time to time received, and, ten days before the day appointed for the passing or taxation of any account, or bill of costs, he shall deliver a certified copy of the account, or bill of costs to the Insurance Registrar at his office and obtain his receipt therefor; and within five days after the passing or taxation of any account or bill of costs, the receiver shall in like manner deliver to the Insurance Registrar a certified copy of the account or bill of costs as passed or taxed. A duplicate of the account or bill of costs to be passed or taxed shall by the person rendering the same be supplied without charge to the receiver to be by him certified and delivered to the Insurance Registrar. 55 V. c. 39, s. 56 (8); 58 V. c. 34, s. 7 (5).

(3) In case of default by any receiver in leaving or passing any account, or in making any deposit or payment, or of laches or negligence in performing any other duty devolving upon the receiver by virtue of his office under this Act, or of an order or direction of the court, the Master either without motion, or on motion by the Insurance Registrar or any person interested, may deal with the receiver as provided in Consolidated Rule 123, or may remove the receiver and appoint another, or make such other order as shall best effectuate the purposes of this Act. 55 V. c. 39, s. 56 (9).

(4) Where any insurance corporation, company, society or association is being wound up either under this Act, or under chapter 183 of the Revised Statutes of Ontario, 1887, or other Act of the Province, the Insurance Registrar shall be a competent party for commencing or prosecuting any action, matter or proceeding relative to the estate of the corporation, or to a receiver or liquidator thereof, or to the sureties of or securities given by either; and to every such action, matter or proceeding otherwise taken, commenced or prosecuted and to every taxation, retaxation, review or revision of costs affecting the estate, the Insurance Registrar shall be a competent and necessary party. 58 V. c. 34, s. 7 (6).

(5) Vacations in the High Court shall not apply to proceedings under sections 184 to 196 of this Act; and any proceedings, reports or appeals under the said sections may be brought, made and carried on in such vacations.

COSTS: PRIORITIES.

196.—(1) Except by consent in writing of the Insurance Registrar no counsel or solicitor shall be employed to act for the receiver or others at the expense of the unregistered corporation or of its funds or estate. 58 V. c. 34, s. 8.

(2) A minute entered on the Master's book shall have the same force as a formal order or direction; and except in special cases, no costs shall be allowed for attending on or taking out a formal order or direction. A copy of any minute certified

under the hand of the Master shall be competent evidence thereof, and for every such certificate a fee of 50 cents shall be payable. 58 V. c. 34, s. 7 (3).

(3) The Local Master or other local officer after taxing any bill of costs payable wholly or in part out of the estate shall forthwith transmit the same for revision to the proper taxing officer at Toronto, as directed by the Consolidated Rules of Practice in the case of bills of costs in actions where the amount is to be paid out of a fund in court, all of which said rules shall, where not inconsistent with this Act, equally apply to the costs of all matters and proceedings in any receivership, liquidation, or winding up under this Act as to the costs in actions or proceedings where the amount is to be paid out of a fund in court. 58 V. c. 34, s. 8.

(4) The costs of any matter or proceeding in the Master's office under this Act shall be on the County Court scale.

(5) The taxed costs of any action, matter or proceeding taken by the Insurance Registrar, or by the receiver with the written consent of the Insurance Registrar, shall be paid out of the funds or estate of the corporation; but, except with the said consent, no costs shall be allowed out of the estate for separate, or other representation of members or certificate holders of the corporation of any class of members or certificate holders; the costs of all other actions, matters or proceedings, shall be in the discretion of the Court. Cf. 58 V. c. 34, s. 8.

(6) All costs charged and expenses properly incurred in the receivership and winding up of the corporation, including the remuneration of the receiver, shall be payable out of the assets of the corporation in priority to all other claims. 58 V. c. 34, s. 8.

(7) Subject to the foregoing provisions, the Master in distributing the assets of the corporation under this Act, shall pay in priority to the claims of the ordinary or general creditors, the salary or wages of all clerks and wage-earners in the employment of the corporation due at the date when the corporation became unregistered or within one month before, not exceeding three months' salary or wages, and such persons shall be entitled to rank as ordinary or general creditors for the residue of their claims. 58 V. c. 34, s. 8.

FEEs.

197.—The fees by this section prescribed shall be payable to the Provincial Treasurer of Ontario, who shall cause to be delivered to the person making the payment a receipt in duplicate therefor. 55 Vic. c. 39, s. 62.

In the case of an application or other document or instrument to be filed, examined or deposited, the fees shall be paid and the duplicate of the Provincial Treasury receipt therefor shall be delivered to the Insurance Registrar before the application, or other document or instrument is considered; in the case of registry or certificates of registry the fee shall be payable before the corporation is registered.

The fees for incorporation of joint stock companies under this Act shall be as prescribed by the Lieutenant-Governor-in-Council by order made in that behalf.

Division I.—Insurance Companies Licensed by the Province.

1. For recording and filing the documents required by sections 3, 17.....	\$ 10 00
2. For filing power of attorney under sections 66, 67.....	5 00
Application for change of name or of head office.....	10 00
3. For initial license to do business :	
Joint Stock Company.....	100 00
Cash Mutual Company	50 00
Mutual.....	25 00
4. For each annual renewal of license :	
Joint Stock Company.....	50 00
Cash Mutual Company.....	25 00
Mutual	5 00

5. For each supplementary license :

Initial.....	20 00
Renewal	10 00

6. For filing annual statements :

Joint Stock Company	5 00
Cash Mutual Company	5 00

R. S. O. 1887, c. 167, s. 63.

Division II.—Corporations Constituted by the Province.

1. Inasmuch as insurance corporations licensed by the Province are under the provisions of this Act required to pay annually to the Province license fees and an assessment, the said corporations shall without application and without additional charge be entitled to be registered under this Act. 55 Vic. c. 39 s. 62 (1).

(2) In the case of Ontario corporations registered or applying for registry on the Friendly Society Register, the fees shall be as follows :—

A.—Corporations or incorporated branches having in Ontario 500 members or less :

(a) Application for initial registry.....	\$ 2 00
(b) Extension of time for making application or delivering documents.....	1 00
(c) Certificate of registry, original or renewed.....	3 00
(d) Interim certificates or extension of certificates.....	2 00
(e) Revivor of registry after suspension.....	2 00
(f) Change of name or of head office.....	4 00

55 V. c. 39, s. 62 ; 57 V. c. 48, s. 2 (3).

B.—Corporations or incorporated branches having in Ontario over 500 and not more than 1,500 members :

(a) Application for initial registry.....	\$ 3 00
(b) Extension of time for making application or delivering documents.....	2 00
(c) Certificate of registry, original or renewed.....	10 00
(d) Interim certificate, or extension of certificate.....	3 00
(e) Revivor of registry after suspension.....	6 00
(f) Change of name or of head office.....	6 00

C.—Corporations or incorporated branches having in Ontario over 1,500 and not more than 2,500 members :

(a) Application for initial registry.....	\$ 4 00
(b) Extension of time for making application or delivering documents.....	2 00
(c) Certificate of registry, original or renewed.....	15 00
(d) Interim certificate, or extension of certificate.....	4 00
(e) Revivor of registry after suspension.....	8 00
(f) Change of name or of head office.....	8 00

D.—Corporations or incorporated branches having in Ontario more than 2,500 members :

(a) Application for initial registry.....	\$ 5 00
(b) Extension of time for making application or delivering documents.....	2 00
(c) Certificate of registry, original or renewed.....	25 00
(d) Interim certificate or extension of certificate.....	5 00
(e) Revivor of registry after suspension.....	10 00
(f) Change of name or of head office.....	10 00

55 V. c. 39, s. 62.

Division III.—Corporations deriving their powers from an Act of Canada or from a document of authorization issued under the Insurance Act of Canada.

1. In the case of corporations deriving their powers from a license or document of authorization issued under *The Insurance Act of Canada*, except corporations included in section 38 thereof, the fees shall be as follows:—

(a) Application for initial registry.....	\$ 5 00
(b) Extension of time for making application or delivering documents.....	2 00
(c) Filing power of attorney in case of extra-Provincial corporations.....	5 00
(d) Filing change of power of attorney.....	5 00
(e) Certificate of registry, original or renewed.....	150 00
(f) Interim certificate of registry, or extension of certificate.....	5 00
(g) Revivor of registry after suspension.....	25 00

2. In the case of corporations empowered under section 38 of *The Insurance Act of Canada*, the fees shall be as follows:—

(a) Application for initial registry.....	\$ 5 00
(b) Extension of time for making application or delivering documents.....	2 00
(c) Filing power of attorney in case of extra-provincial corporations.....	5 00
(d) Filing change of power of attorney.....	5 00
(e) Certificate of registry, original or renewed.....	100 00
(f) Interim certificate of registry, or extension of certificate.....	5 00
(g) Revivor of registry after suspension.....	20 00

3. In the case of corporations, companies, insurers or underwriters undertaking or transacting ocean marine insurance only, and also in case of corporations, companies, insurers and underwriters within the intent of section 3 (a) or section 32 of *The Insurance Act of Canada* found admissible to registry under this Act, the fee for certificate of registry, whether original or renewed, shall be \$10.00. 55 V. c. 39, s. 62; 56 V. c. 32, s. 10 (16).

4. In the case of corporations mentioned in sub-sections 2, 4 and 5 of section 60 of this Act, the fees shall be as in sub-section 2 A of *Division II.* of this section.

5. In the case of the corporations mentioned in sub-section 3 of section 60 of this Act, the fees shall be as follows:—

(a) Application for initial registry.....	\$ 2 00
(b) Extension of time for making application or delivering documents.....	1 00
(c) Filing power of attorney in extra-provincial corporations.....	2 00
(d) Filing change of power of attorney.....	2 00
(e) Certificate of registry, original or renewed.....	3 00
(f) Interim certificate of registry, or extension of certificate.....	2 00
(g) Revivor of registry after suspension.....	3 00

55 V. c. 39, s. 62; 58 V. c. 34, s. 9.

IV.—Friendly Societies not included in either of the foregoing Divisions.

In the case of extra-Provincial friendly societies, the fees shall be in respect of powers of attorney as enacted in subdivision 1 *Division III.* and in other respects shall be as in subdivision 2 D of *Division II.* of this section. 55 V. c. 39, s. 62. 56 V. c. 32, s. 10 (16).

Provided, that when the fee for any term of registry under any division of this section exceeds \$10, the fee payable for a certificate covering a period of six months or under shall be one-half of the fee payable for the full term. 58 V. c. 34, s. 9.

Division V.—Miscellaneous.

Office copy of decision of Insurance Registrar.....	\$1 00
Certified copy of certificate of registry.....	1 00
Certified copy of entry on register.....	50
Copies of or extracts from documents filed with or issued by the Insurance Registrar per folio of 100 words.....	10

Certificate of exemption from registry, \$1.00; filing of certificate of incorporation or any other separate document required by this Act to be filed in the office of the Provincial Registrar, \$1.00. 55 V. c. 30, s. 82; 56 V. c. 32, s. 10 (16).

198.—(1) The several Acts and parts of Acts specified in Schedule C to this Act are hereby repealed.

(2) All Acts or parts of Acts inconsistent with this Act are hereby repealed.

(3) Subsection 17 of section 114 of chapter 167 of the Revised Statutes of Ontario, 1887, shall, notwithstanding anything herein contained, apply to contracts of insurance in force at the passing of this Act.

(4) Section 4 of chapter 157 of the Revised Statutes of Ontario is hereby amended by striking out in 8th and 9th lines the following words: "And the business of insurance, other than as provided by section 4 of *The Ontario Insurance Act*."

SCHEDULE A.

(Referred to in Section 60 (6).)

Age at entry.	Net level Premium for all-life insurance of \$1,000.			
	Yearly, in advance.	Half-yearly, in advance.	Quarterly, in advance.	Monthly, in advance.
	\$	\$	\$	\$
18	9.86	5.00	2.51	.84
19	10.20	5.18	2.60	.87
20	10.55	5.36	2.69	.90
21	10.91	5.53	2.78	.93
22	11.28	5.71	2.87	.96
23	11.66	5.89	2.96	.99
24	12.03	6.07	3.05	1.02
25	12.42	6.25	3.14	1.05
26	12.76	6.43	3.23	1.08
27	13.12	6.60	3.32	1.11
28	13.49	6.78	3.41	1.14
29	13.87	7.02	3.53	1.18
30	14.31	7.20	3.62	1.21
31	14.76	7.44	3.74	1.25
32	15.22	7.68	3.86	1.29
33	15.73	7.91	3.98	1.33
34	16.25	8.21	4.13	1.38
35	16.82	8.51	4.28	1.43
36	17.42	8.81	4.43	1.48
37	18.05	9.10	4.57	1.53
38	18.71	9.46	4.75	1.59
39	19.42	9.82	4.93	1.65
40	20.18	10.17	5.11	1.71
41	20.97	10.59	5.32	1.78
42	21.81	11.01	5.53	1.85
43	22.70	11.48	5.77	1.93
44	23.65	11.96	6.01	2.01
45	24.66	12.44	6.25	2.09
46	25.72	12.97	6.52	2.18
47	27.31	13.80	6.94	2.32
48	28.10	14.16	7.12	2.38
49	29.36	14.82	7.45	2.49
50	30.72	15.53	7.80	2.61
51	32.17	16.24	8.16	2.73
52	33.71	17.02	8.55	2.86
53	35.34	17.85	8.97	3.00
54	35.07	18.75	9.42	3.15
55	38.94	19.64	9.87	3.30

SCHEDULE B.

Referred to in Section 192 (1).

ONTARIO INSURANCE ACT, 1897.

In the High Court of Justice,

In the matter of _____, an unregistered insurance corporation.

Pursuant to the judgment and direction of the Insurance Registrar herein, dated the _____ day of _____, 18____, revoking and cancelling the registration of the aboved named corporation (*or as the case may be*).

The creditors and persons (others than holders of unmatured policies or certificates of the corporation) having claims against the said corporation are, on or before the _____ day of _____, 18____, to deliver or send by post, prepaid, to _____, of _____, the Receiver of the above mentioned corporation, an affidavit showing their christian names and surnames, addresses and descriptions, the full particulars of their claims, a statement of their accounts and the nature of the security, if any, held by them; or, in default thereof, they will be peremptorily excluded from the benefit of the said judgment and direction, and from all share in the assets of the estate; and the said creditors and claimants, if so required by notice in writing from the said Receiver, are to come in and prove their debts and claims and produce their securities, if any, before me at my chambers at _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, being the time appointed for hearing and adjudicating upon debts and claims; or, in default thereof, they will be excluded from the benefit of any distribution of assets.

The status and rights of persons interested under unmatured policies of the corporation shall, in the absence of contestation and without any claim made, be determined by the books and records of the corporation, or of its officers; a schedule showing the said status and rights may be seen in the office of the Receiver at the above address.

Notices and letters respecting the estate or any alleged right or interest therein, are to be addressed to the Receiver as above, and all letters requiring answer are to enclose a stamped and addressed envelope for reply.

Dated this _____ day of _____, 18____.

Master.

58 V. c. 34, Schedule.

SCHEDULE C.

Referred to in Section 198.

ACTS AND PARTS OF ACTS REPEALED.

Year and Chapter.	Title or Short Title.	Extent of repeal.
1887 R. S. O. c. 136.	An Act to secure to wives and children the benefit of Life Insurance.....	The whole
1887 R. S. O. c. 167.	The Ontario Insurance Act.....	The whole
1888 51 V. c. 25.....	An Act to amend the Act respecting Insurance Companies.....	The whole
1888 51 V. c. 22.....	An Act to amend the Act to secure to wives and children the benefit of Life Insurance.....	The whole
1889 52 V. c. 30.....	An Act to amend the Act respecting Insurance Companies.....	The whole
1889 52 V. c. 31.....	An Act to amend The Ontario Insurance Act.....	The whole
1889 52 V. c. 32.....	An Act respecting Contracts of Life Insurance.....	The whole
1890 53 V. c. 39.....	An Act respecting Contracts of Life Insurance.....	The whole
1890 53 V. c. 44.....	An Act to amend The Ontario Insurance Act.....	The whole
1891 54 V. c. 37.....	An Act to amend The Ontario Insurance Act.....	The whole
1892 55 V. c. 39.....	The Insurance Corporations Act, 1892.....	The whole
1893 56 V. c. 32.....	An Act respecting the Insurance Law.....	The whole
1894 57 V. c. 48.....	An Act respecting Benefit Societies.....	The whole
1895 58 V. c. 34.....	An Act respecting the Insurance Law.....	The whole
1896 59 V. c. 45.....	An Act relating to the law of Insurance.....	The whole

Since this work has been put in press, efforts have been made by representatives of the "Mutual Fire Underwriters' Association of Ontario," to amend the Insurance Act. They desire *inter alia* that registration under oath of all fire losses be made compulsory on municipalities, giving particulars relating to the insurances and losses, returns for which should be made to the "Ontario Bureau of Statistics," for publication; and they also wish that the trial judge should dispose of all questions of materiality under any insurance contract, and that these questions be not left to the jury.

NOVA SCOTIA ENACTMENTS.

In Nova Scotia under the Revised Statutes, (1884) cap. 78, sec. 20, provision is made for annual returns of insurance companies to the Provincial Secretary. And under 49 Vic., cap. 57 (N.S.), the formation of Mutual Fire Insurance Companies is provided for.

NEW BRUNSWICK ENACTMENTS.

55 VIC., CAP. 4.

An Act to impose certain Taxes on certain incorporated Companies and Associations.

(As amended by 58 Vic., cap. 13, (N.B.) and by 58 Vic., cap. 22, (N.B.) and by 59 Vic., cap. 35, (N.B.)

1. In order to provide for the exigencies of the public service, there shall be and are hereby imposed upon the companies and associations hereinafter mentioned the taxes hereinafter specifically named, which taxes each of such incorporated companies and associations respectively, shall annually pay to the Receiver General for the use of the province.

(2) Upon all companies accepting risks and carrying on the business of insurance against fire, one per centum of the net premiums received by each, together with an additional sum of one hundred dollars to be paid by each of the said companies whose principal office or organization is not within the province. (The words "net premiums" in this sub-section are hereby declared to mean the gross premiums received by each of the said companies upon its business within the province for the year preceding the first day of May of the year in which the tax is paid, less any amount paid for reinsurance within this province or upon the cancellation of any of its policies.)

(3) Upon all insurance companies and associations of any kind having agencies or accepting risks upon the lives of persons within the province, and transacting the business of life or endowment insurance therein as the sole object of their organization or as incidental to other purposes of their organization, whose principal office and organization is not within the province, the sum of two hundred and fifty dollars; and of all similar companies or associations whose principal office and organization is within the province, the sum of one hundred dollars.

(4) Upon all companies doing the business of accident and guarantee insurance within the province the sum of twenty-five dollars; and an additional sum of one

half of one per centum upon the premiums of insurance annually received by each company in respect of its insurance in this province.

*2. Such taxes, as far as respects the corporations or associations mentioned in sub-sections 1 to 14 inclusive, shall be payable by such corporations and associations semi-annually on the first juridical day in the months of June and December in each year, commencing on the first juridical day of June following the passage hereof, on which day the first semi-annual payment of the taxes aforesaid shall be due and payable by such companies to the Receiver-General of the province.

3. On or before the first day of May in each year, every corporation doing the business of fire insurance or accident or guarantee insurance within the province, shall, without awaiting any notice or demand to that effect from the Receiver-General, forward to him a detailed statement, in which shall be set forth the gross amount of the premiums received by such corporation in respect of its fire, accident and guarantee business within the province for the then last financial year, showing also in the case of fire insurance corporations the amount paid by each such corporation for reinsurance within the province or on the cancellation of any of its policies. * * * In the case of life, fire, accident and guarantee companies doing business within the province, each of such companies shall annually at the same date make a report to the Receiver-General of the number and situation of its agencies and of the names of its agents at each agency, which reports and returns by this section required, shall in all cases be verified under oath by the manager or general agent within the province, then by the agent at the principal agency within the province.

4. Every corporation or association whose duty it is to furnish a statement or report to the Receiver-General, as in the last preceding section required, neglecting or refusing to make such statement or report, or making an incomplete or incorrect statement or report, shall *ipso facto* be liable to a fine of ten dollars per day for each day during which such neglect or refusal continues, counting from the day when such return should have been made as required by the preceding section, until such report or statement is forwarded to the Receiver-General. An incorrect or incomplete statement shall be deemed not to be a report or statement within the requirements of this Act.

5. Every annual tax imposed by this Act shall on the date on which it becomes due become a Crown debt, and if not paid on such date may be recovered with legal interest thereon by an action brought in the name of Her Majesty by the Receiver-General of the province in any court of competent jurisdiction; and all fines imposed by this Act shall be recoverable in the same manner.

6. Costs shall not be awarded or adjudged against Her Majesty in any action instituted in Her Majesty's name by the Receiver-General under this Act, but on the recommendation of the court the Receiver-General may, in his discretion, pay to the party in favour of which judgment has been rendered, the costs to which he may deem such party equitably entitled.

7. The taxes imposed by this Act shall form part of the revenue of the province, and any expenses incurred in carrying out this Act may, from time to time, be paid out of such revenue on the recommendation of the Receiver-General.

58 VIC., CAP. 13 (N.B.)

Notwithstanding anything contained in the Act of Assembly, 55 Vic., chap. 4, intituled: "An Act to impose certain taxes on certain Incorporated Companies and Associations," the taxes imposed on all insurance companies as mentioned in the said Act, shall be payable on the first juridical day in the month of June in each year, and such taxes shall be for the year following the date on which the same are hereby made payable.

55 VIC., CAP. 5 (N.B.).

*An Act to impose Taxes on certain Life Insurance Agents.
(As amended by 59 Vic., Cap. 34, (N.B.)*

1. There shall be and is hereby imposed upon all Special or Travelling Agents, soliciting application for insurance on behalf of Life Insurance Companies or Associations of any kind doing a business of Life or Endowment Insurance, or on behalf of any Life Insurance Company or Association to which the business of Life Insurance is incident in addition to other purposes of its organization, an annual tax or license fee of one hundred dollars, to be paid to the Receiver-General, prior to such agent or person engaging in such business; provided, however, that no person who is a resident of the province at the time of the passing of this Act, and continues to have a residence therein at the time of and during such employment has an office or fixed place of business in the province, nor any person being employed after the passing of this Act, who shall have resided within the province twelve months prior to such employment, and has during such employment an office or fixed place of business as aforesaid, shall be subject to the said tax.

2. The tax or license fee imposed by this Act shall, when collected, form part of the revenue of the province, and the Receiver-General may, out of the proceeds thereof, from time to time, on the order of the Governor-in-Council, pay any expenses incurred in carrying out the provisions of this Act.

3. Any person liable to the tax imposed by section one of this Act, who shall engage in the business of soliciting applications for insurance on behalf of life insurance companies or associations as aforesaid, without having first paid to the Receiver-General the amount of the said tax, shall be liable to a penalty of one hundred dollars, and ten dollars additional for every day he so engages in such business, which penalty may be recovered by summary conviction, in the name of Her Majesty, on the information of any person. All penalties when recovered shall be by the Justice forthwith paid over to the Receiver-General.

4. Any agent or person paying the tax aforesaid, shall receive a certificate under the hand of the Receiver-General of the payment of the said tax, and upon such payment and the issue of such certificate, notice thereof shall be published in the *Royal Gazette*. The payment of such tax and issuing of such certificate shall entitle the person named therein to prosecute the said business for one year from the date of such certificate, but no longer.

5. On the hearing of any information under this Act, proof of the fact of the person charged having solicited insurance as aforesaid, shall be *prima facie* evidence of his guilt, and the onus shall be on him of proving the payment of the said tax, or that he comes within the exception mentioned in section one of this Act. The production of the certificate of the Receiver-General shall be evidence of payment of such tax.

6. Any general agent of a life insurance company or association whose territory as such general agent includes New Brunswick, and who resides outside this province, shall be subject to an annual tax or license fee of ten dollars, and not to the tax or fee of one hundred dollars imposed by section 1 of this Act.

7. On forwarding to the Receiver-General the report or statement of the agencies, and the names of their agents or sub-agents, as required by chapter 4, of 55th Victoria, life insurance companies shall cause to be paid annually to the Receiver-General, the sum of two dollars for each agent and sub-agent, upon which payment a license shall issue to each of such agents or sub-agents for whom the said fee has been paid, and no person shall act as agent or sub-agent in soliciting insurance for any life insurance company or association who is not so licensed without being subject to a penalty of ten dollars for every day he engages in such business without license.

55 Vic., cap. 17 (N.B.) provides for the acceptance of "Policies of Guarantee Companies as security for the faithful conduct of Public Officers."

At a meeting of the Board of Trade of St. John, N.B., held on 7th September, 1897, it was resolved that the council be asked to consider the advisability of requesting the Minister of Agriculture to have a standard policy form prepared that will fairly protect both insurers and insured.

PRINCE EDWARD ISLAND ENACTMENTS.

51 VIC., CHAP. XII.

An Act to consolidate and amend the several Acts incorporating the City of Charlottetown.

73. Every life, marine or fire insurance company, or association established in the City of Charlottetown, or having any branch office, agent or agencies therein, shall be assessed in respect of the real estate and movable personal property owned by said company or association in the same way as the other ratepayers of the City of Charlottetown are assessed, and shall in addition thereto pay an annual license fee of fifty dollars each. If the same company or association is engaged in more than one branch of insurance business it shall pay a license fee for each branch of its business, at the rate above-mentioned for each. In cases where assurance companies are engaged in winding up their business in the City of Charlottetown and are issuing no new policies, they shall be exempt from such additional tax or license fee, and shall only be assessed on their real and personal property.

74. The said annual tax or license fee of every company, association or agency, shall become due and payable on the first day of June in each year, and the agent or manager of any company or association which has not been incorporated by the Legislature of Prince Edward Island, shall be personally liable for the license fee payable by the company or association of which he is agent or manager, and also for the rates and taxes payable in respect of the assessment on its real estate and personal property as if he had been assessed therefor personally, but nothing herein contained shall prevent the City Collector from enforcing the payment of the license fee, rates and taxes due by any company or association in manner hereinafter provided.

75. The annual tax or license fee payable by every such incorporated or joint stock bank, life, marine or fire insurance company, or association, may be recovered at the suit of, and in the name of the City Collector in the City Court of said city, or other court of competent jurisdiction. And proceedings for the recovery of any such actual tax or license fee, shall be taken against any such bank, company or association in its corporate name, and any summons issued for the recovery of any such annual tax or license fee, shall and may be served upon the cashier, secretary or agent of such bank, company, or association, which service shall be good service as against such bank, company or association.

* * *

57 VIC., CHAP. 3, (P.E.I.)

An Act to impose certain taxes on certain incorporated Companies and Associations.

1. In order to provide for the exigencies of the public service there shall be and are hereby imposed upon the companies and associations hereinafter mentioned, the taxes hereinafter specifically named, which taxes each of such incorporated companies and associations respectively, shall annually pay to the Provincial Secretary for the use of the Province.

(1) Upon all companies accepting risks and carrying on the business of insurance against fire in the Province, whose principal office or organization is not within the Province, the sum of one hundred dollars.

(2) Upon all insurance companies and associations of any kind having agencies or accepting risks upon the lives of persons within the Province and transacting the business of life or endowment insurance therein as the sole object of their organization, or as incidental to other purposes of their organization, whose principal office and organization is not within the province, the sum of one hundred and fifty dollars.

(3) Upon all companies doing the business of accident and guarantee insurance within the Province, the sum of twenty-five dollars.

* * * * *

2. Such taxes as far as respects the corporations or associations mentioned in sub-section 1 to 7 inclusive, shall be payable by such corporations and associations semi-annually on the first juridical day in the months of June and December in each year, commencing on the first juridical day of June following the passage hereof, on which day the first semi-annual payment of the taxes aforesaid shall be due and payable by such companies to the Provincial Secretary of the Province.

3. Every tax imposed by this Act shall, on the date on which it becomes due, become a Crown debt, and if not paid on such date, may be recovered with legal interest thereon, and full costs of suit by an action brought in the name of Her Majesty by the Provincial Secretary of the Province, in the Supreme Court of Judicature of the Province—every such action to be tried without a jury.

4. Costs shall not be awarded or adjudged against Her Majesty in any action instituted in Her Majesty's name by the Provincial Secretary under this Act, but on the recommendation of the Court, the Provincial Secretary may, in his discretion, pay to the party in favour of which judgment has been rendered, the costs to which he may deem such party equitably entitled.

5. The taxes imposed by this Act shall form part of the revenue of the province, and any expenses incurred in carrying out this Act may, from time to time, be paid out of such revenue.

60 VIC., CHAP. 5, (P.E.I.)

An Act respecting Surety and Guarantee Companies.

1. That whenever any bond, undertaking, recognizance, or other obligation is by law or the charter, ordinances, rules or regulations of any municipality, board, body, organization, court, judge or public officer, required or permitted to be made, given, tendered or filled with surety or sureties, and whenever the performance of any act, duty or obligation, or the refraining from any act is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance or guarantee, may be executed by a surety company qualified as hereinafter provided; and such execution by such company of such bond, undertaking, obligation, recognizance or guarantee, shall be in all respects a full and complete compliance with every requirement of every law, charter, ordinance, rule or regulation, that such bond, undertaking, obligation, recognizance or guarantee shall be executed by one surety or by

one or more sureties, or that such sureties shall be residents or householders, or freeholders, or either or both, or possess any other qualification, and all courts, judges, heads of departments, boards, bodies, municipalities, and public officers of every character may, if they see fit, accept and treat such bond, undertaking, obligation, recognizance or guarantee, when so executed by such company, as conforming to and fully and completely complying with every such requirement of every such law, charter, ordinance, rule or regulation.

2. That such company to be qualified to so act as surety or guarantor must comply with the requirements of every law of this Province applicable to such company doing business therein, must be authorized under the laws of the province or state where incorporated, and under its charter to become security upon such bond, undertaking, obligation, recognizance or guarantee, must have a fully paid-up and safely invested and unimpaired capital of at least two hundred and fifty thousand dollars, must have good available assets exceeding its liabilities, which liabilities for the purposes of this Act, shall be taken to be its capital stock, its outstanding debts and a premium reserve at the rate of fifty per centum of the current annual premiums on each outstanding bond, undertaking, recognizance and obligation, of like character in force, must file with the Provincial Secretary a written application to be authorized to do business under this Act, and also with such application, and in each year thereafter, a statement verified under oath, made up to December thirty-first, preceding, stating the amount of its paid-up cash capital particularizing each item of investment, the amount of premiums upon existing bonds, undertakings, recognizances and obligations of like character in force upon which it is surety, the amount of liability for unearned portion thereof estimated at the rate of fifty per centum of the current annual premiums on each such bond, undertaking, recognizance and obligation in force, stating also the amount of its outstanding obligations of all kinds, and such further facts as may be by the laws of this Province required of such company in transacting business therein; must also appoint an attorney in this Province upon whom process of law can be served, which appointment shall continue until revoked or another attorney substituted, and must file with the Provincial Secretary evidence of such appointment, which shall state the residence and office of such attorney.

3. That the Provincial Secretary, upon due proof by any such company of its possessing the qualifications in this Act specified, shall issue to such company a certificate setting forth that such company has qualified and is authorized for the ensuing year to do business under this Act, which said certificate shall be evidence of such qualification of such company, and of its authorization to become and to be accepted as sole surety on all bonds, undertakings, recognizances and obligations required or permitted by law or the charter, ordinances, rules or regulations of any municipality, board, body, organization or public officer.

4. That from and after the passage of this Act, the surety or the representative of any surety, upon the bond of any trustee, committee, guardian, assignee, receiver, executor or administrator, or other fiduciary, may apply by petition to the court wherein said bond is directed to be filed, or which may have jurisdiction of such trustee, committee, guardian, assignee, receiver, executor or administrator, praying to be relieved from further liability as such surety, for the acts or omissions of the trustee, committee, guardian, assignee, receiver, executor or administrator or other fiduciary, which may occur after the date of the order relieving such surety to be granted as herein provided for and to require such trustee, committee, guardian, assignee, executor or administrator, or other fiduciary to show cause why he should not account, and said surety be relieved from such further liability as aforesaid, and said principal be required to give a new bond; and thereupon, upon filing of said petition, said court shall issue such order returnable at such time and place, and to be served in such a manner as said court shall direct, and may restrain such trustee, committee, guardian, assignee, receiver, executor or administrator, or other fiduciary, from acting except in such manner as it may direct to preserve the trust

estate; and upon the return of such order to show cause if the principal in the bond account in due form of law, and file a new bond duly approved, then said court must make an order releasing said surety, filing the petition as aforesaid, from liability upon the bond for any subsequent act or default of the principal; and in default of said principal thus accounting and filing such new bond, said court shall make an order directing such trustee, committee, guardian, assignee, receiver, executor or administrator, or fiduciary, to account in due form of law within thirty days, and that if the trust fund or estate shall be found or made good and paid over or properly secured, such surety shall be discharged from any and all further liability as such for the subsequent acts or omissions of the trustee, committee guardian, assignee, executor or administrator, or fiduciary, after the date of such surety being so relieved or discharged, and discharging such trustee, committee, guardian, assignee, receiver, executor or administrator or fiduciary.

5. That any receiver, assignee, guardian, trustee, committee, executor, administrator or curator or other fiduciary required by law, or the order of any court or judge, to give a bond or other obligation as such, may include as part of the lawful expense of executing his trust such reasonable sum paid a company authorized under the laws of this Province, so to do, for becoming his surety on such bond as may be allowed by the court in which, or a judge before whom, he is required to account, not exceeding one per centum per annum on the amount of such bond; and in all actions and proceedings a party entitled to recover disbursements therein shall be allowed, and may tax and recover such sum paid such a company for executing any bond, recognizance, undertaking, stipulation or other obligation therein, not exceeding, however, one per cent. on the amount of the liability upon such bond, recognizance, undertaking, stipulation or other obligation during each year the same has been in force.

MANITOBA ENACTMENTS.

REVISED STATUTES OF MANITOBA 1891, CHAPTER 59.

An Act to secure uniform conditions in policies of fire insurance.

1. This Act may be cited as "The Fire Insurance Policy Act."

2. Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province, as to the proof to be given to the insurance company after the occurrence of a fire, have not been strictly complied with, or where, after a statement or proof of loss has been given in good faith or on behalf of the insured, in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not, within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to and what are the particulars in which the same is alleged to be defective, and so from time to time, or where from any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof, or amended or supplemental statement or proof

(as the case may be), shall, in any of such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before the seventeenth day of July, in the year one thousand eight hundred and eighty-eight.

3. The conditions set forth in the schedule A to this Act shall, as against the insurers, be deemed to be part of every policy of fire insurance which has been, since the sixteenth day of July in the year one thousand eight hundred and eighty-eight, or which shall hereafter be, entered into or renewed or otherwise in force in Manitoba, with respect to any property therein, and shall be printed on every such policy with the heading "Statutory Conditions."

4. If a company or other insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added in conspicuous type, and in ink of different colour, words to the following effect:—

"Variations in Conditions.

"This policy is issued on the above statutory conditions, with the following variations and additions:—

"These variations (*or as the case may be*) are, by virtue of the Manitoba statute in that behalf, in force so far as by a court or judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be enacted by the company."

5. No such variation, addition or omission shall, unless the same is distinctly set forth in the manner or to the effect aforesaid, be legal and binding on the insured; and no question shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, but, on the contrary, the policy shall, as against the insurers, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid.

6. In case any policy is entered into or renewed containing or including any condition other than or different from the conditions set forth in schedule A to this Act, if the said condition so contained or included is held by a court or a judge before whom a question relating thereto is tried to be not just and reasonable, such condition shall be null and void.

7. A decision of a court or a judge under this Act shall be subject to review or appeal to the same extent as a decision by such court or judge in other cases.

SCHEDULE.

The following is the schedule referred to in this Act:—

SCHEDULE A.

Statutory Conditions.

1. If any person or persons insure his or their buildings or goods and cause the same to be described otherwise than as they really are to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

2. After application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out, in writing the particulars, wherein the policy differs from the application.

3. Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company, when so notified, may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium which the insured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force.

4. If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to cases where there is a change of title by succession, or by operation of the law, or by reason of death.

5. When property insured is only partially damaged, no abandonment of the same will be allowed unless by the consent of the company or its agent; and in case of the removal of property to escape conflagration, the company will contribute to the loss and expenses attending such act of salvage, proportionately to the respective interests of the company or companies and the assured.

6. Money, books of account, securities for money and evidences of debt or title are not insured.

7. Plate, plated ware, jewelry, medals, paintings, sculptures, curiosities, scientific and musical instruments, bullion, works of art, articles of virtu, frescoes, clocks, watches, trinkets, plate-glass and mirrors, are not insured, unless mentioned in the policy.

8. The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after notice of the intention or desire to effect the subsequent insurance has been mailed to it addressed to its principal office in Manitoba by registered letter, or does not dissent in writing after that time and before the subsequent or further insurance is effected.

9. In the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage without reference to the dates of the different policies.

10. The company is not liable for the loss following, that is to say:—

(a) For loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy;

(b) For loss caused by invasion, insurrection, riot, civil commotion, or military or usurped power;

(c) Where the insurance is upon buildings or their contents, for loss caused by ashes or embers being deposited, with the knowledge and consent of the assured, in wooden vessels; or by stoves or stove pipes being, to the knowledge of the assured, in an unsafe condition or improperly secured;

(d) For loss or damage to goods destroyed or damaged while undergoing any process in or by which the application of fire heat is necessary;

(e) For loss or damage occurring to buildings or their contents while the buildings are being repaired by carpenters, joiners, plasterers or other workmen, and in consequence thereof, unless permission to execute such repairs had been previously granted in writing, signed by a duly authorized agent of the company. But in dwelling houses, fifteen days are allowed in each year for incidental repairs, without such permission;

(f) For loss or damage occurring while petroleum, rock, earth or coal oil, camphine, gasoline, burning fluid, benzine, naphtha or any liquid products thereof, or any of their constituent parts (refined coal oil for lighting purposes only, not exceeding

five gallons in quantity, excepted), or more than twenty-five pounds weight of gun-powder, is or are stored or kept in the building insured or containing the property insured, unless permission is given in writing by the company.

11. The company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion or lightning.

12. Proof of loss must be made by the assured, although the loss be payable to a third party.

13. Any person entitled to make a claim under this policy is to observe the following conditions,—

- (a) He is, forthwith after loss, to give notice in writing to the company ;
- (b) He is to deliver, as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits ;
- (c) He is also to furnish therewith a statutory declaration, declaring,—
 - (1) That the said account is just and true ;
 - (2) When and how the fire originated, so far as the declarant knows or believes ;
 - (3) That the fire was not caused through his wilful act or neglect, procurement, means or contrivance ;
 - (4) The amount of other insurance ;
 - (5) All liens and encumbrances on the subject of insurance ;
 - (6) The place where the property insured, if movable, was deposited at the time of the fire ;

(d) He is, in support of his claim, if required and if practicable, to produce books of account and furnish invoices and other vouchers, to furnish copies of the written portions of all policies, and to exhibit for examination all that remains of the property which was covered by the policy ;

(e) He is to produce, if required, a certificate under the hand of a magistrate, notary public, commissioner for taking affidavits or municipal clerk, residing in the vicinity in which the fire happened, and not concerned in the loss or related to the assured or sufferer, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has by misfortune and without fraud or evil practice sustained loss and damage on the subject assured to the amount certified.

14. The above proofs of loss may be made by the agent of the assured, in case of the absence or inability of the assured himself to make the same, such absence or inability being satisfactorily accounted for.

15. Any fraud or false statement in a statutory declaration, in relation to any of the above particulars, shall vitiate the claim.

16. If any difference arises as to the value of the property insured, of the property saved or of the amount of the loss, such value and amount and the proportion thereof, if any, to be paid by the company, shall, whether the right to recover on the policy is disputed or not, and independently of all other questions, be submitted to the arbitration of some person to be chosen by both parties, or, if they cannot agree on one person, then to two persons, one to be chosen by the party assured and the other by the company, and a third to be appointed by the persons so chosen or, on their failing to agree, then by the judge of the county court of the judicial division wherein the loss has happened ; and such reference shall be subject to the provisions of the laws applicable to references in actions ; and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and proportion to be paid by the company ; where the full amount of the claim is awarded the costs shall follow the event, and in other cases all questions of costs shall be in the discretion of the arbitrators.

17. The loss shall not be payable until ——— days after completion of the proofs of loss, unless otherwise provided for by the contract of insurance.

(The blank shall be filled in the case of mutual and cash mutual companies with the word "sixty," and in the case of other companies with the word "thirty.")

18. The company, instead of making payment, may repair, rebuild or replace within a reasonable time the property damaged or lost, giving notice of their intention within fifteen days after the receipt of the proof herein required.

19. The insurance may be terminated by the company by giving notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium for the unexpired term, calculated from the termination of the notice; in the case of personal service of the notice, five days' notice, excluding Sunday, shall be given. Notice may be given by any company having an agency in Manitoba by registered letter addressed to the assured at his last post office address notified to the company, and where no address notified, then to the post office of the agency from which application was received, and where such notice is by letter then ten days from the arrival at any post office in Manitoba shall be deemed good notice. And the policy shall cease after such tender and notice aforesaid and the expiration of the five or ten days, as the case may be.

20. No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company, unless the waiver is clearly expressed in writing, signed by an agent of the company.

21. Any officer or agent of the company, who assumes on behalf of the company to enter into any written agreement relating to any matter connected with the insurance, shall be deemed *prima facie* to be the agent of the company for the purpose.

22. Every action or proceeding against the company for the recovery of any claim under or by virtue of this policy shall be absolutely barred, unless commenced within the term of one year next after the loss or damage occurs.

23. Any written notice to a company for the purpose of the statutory conditions, where the mode thereof is not expressly provided for, may be by letter delivered at the head office of the company in Manitoba, or by registered post letter addressed to the company, its manager or agent at such head office, or by such written notice given in any other manner to an authorized agent of the company.

THE MANITOBA INSURANCE ACT.

Being Chapter 13 of the Acts of the Legislative Assembly of the province of Manitoba, 1894, assented to 2nd March, 1894. As amended by 58 Vic., chapters 21 and 22, and 60 Vic., chapter 10.

1. This Act may be cited as "The Manitoba Insurance Act."

INTERPRETATION.

Section 2. Where the words following occur in this Act they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears.

(a) "Province" and "Legislature" mean respectively the province and the legislature of Manitoba.

(b) "Treasurer" means the treasurer of the province or any member of the Executive Council, to whom from time to time may be transferred, either for a limited period, or otherwise, the powers and duties which are by this Act assigned to the treasurer.

(c) "Company" means and includes any corporation, or any society or association, incorporated or unincorporated, or any partnership or any underwriter, except as provided by section 3, that undertakes or effects for valuable consideration, or agrees or offers so to undertake or effect, in the province, any contract of indemnity, guarantee, suretyship, insurance, endowment, tontine, or annuity on life, or any

like contract which accrues payable on and after the occurrence of some contingent event.

(d) The expression "offer to undertake any contract," shall include the setting up of a sign or inscription containing the name of the company; or the distribution or publication of any proposal, circular, card, advertisement, printed form, or like document in the name of the company, or any written or oral solicitation in the company's behalf.

(e) "Contract" means and includes any contract or agreement, sealed, written or oral, the subject-matter of which is within the intent of paragraph "c" hereof.

(f) "Written" as applied to any instrument, includes written or printed, or partly written and partly printed.

(g) "Provincial Company" means a company incorporated by or under any Act of the Legislature of Manitoba.

(h) "Canadian Company" means a company incorporated or legally constituted in the Dominion of Canada, other than a company included under paragraph "g" hereof.

(i) "Inland marine insurance" means marine insurance in respect of subjects of insurance at risk in Canada above the harbour of Montreal.

(j) "Mutual insurance" means insurance given in consideration of a premium note, or undertaking with or without an immediate cash payment thereon; and "Mutual Company" means a company empowered solely to transact such insurance.

(k) "Cash-Mutual Company" means a company organized to transact mutual insurance, but empowered to undertake contracts of insurance on both the cash plan and the premium note or mutual plan.

APPLICATION OF ACT.

Section 3. The provisions of this Act shall not apply:—

(a) To a company licensed by the Dominion of Canada except as to sections, 2, 4 to 8 (both inclusive), 25 to 31 (both inclusive), 41 and 44, and 50 to 54 (both inclusive).

LICENSE.

Section 4. No company shall undertake or solicit, or agree or offer to undertake, any contract within the intent of section 2 of this Act, whether the contract be original or renewed; except the renewal from time to time of life assurance policies; or accept or agree or negotiate for any premium or other consideration for the contract; or prosecute or maintain any action or proceeding in respect of the contract, except such actions or proceedings as arise in winding-up the affairs of the company, without first obtaining from the treasurer, and holding a license or certificate of registration, or a renewal of such license or certificate under the provisions of this Act.

Section 5. The license or certificate of registration shall be in such form as may be from time to time determined by the treasurer, and it shall specify the business to be carried on by the company; and shall expire on the thirty-first day of December in each year, but shall be renewable from year to year.

Section 6. So soon as a company applying for a license has deposited with the treasurer the securities hereinafter mentioned, and has otherwise conformed to the requirements of this Act, the Treasurer may issue the license.

(2) Insurance licensees of the Dominion of Canada shall, upon due application and upon proof of such Dominion license subsisting and upon otherwise conforming to the provisions of this Act applicable to Dominion licensees, be entitled to be registered under this Act.

Section 7. Every company, on first obtaining such license or certificate of registration, shall forthwith give notice thereof in the *Manitoba Gazette* and in at least one newspaper in the city of Winnipeg, and shall continue the publication thereof

once each week for the space of four weeks ; and shall give the like notice for the same period when the company ceases to carry on business in Manitoba.

Section 8. The treasurer shall cause to be published yearly in the *Manitoba Gazette* a list of companies licensed or registered under this Act, with the amount of the deposit, if any, made by each company ; and upon a new company being licensed or registered, or upon the license or certificate of a company being withdrawn, he shall publish a notice thereof in the *Manitoba Gazette* for the space of two weeks.

Sections 9, 10, 11, treat on the subject of deposit of securities with the Treasurer.

Section 12. A company having made a deposit under this Act shall be entitled to withdraw the deposit, with the sanction of the Lieutenant-Governor in Council, whenever it is made to appear to the satisfaction of the Lieutenant-Governor in Council that the company is carrying on its business of insurance under license from the Dominion of Canada.

Sections 13 to 24 refer to the administration and insufficiency, etc., of securities.

DOCUMENTS TO BE FILED.

Section 25. Before the issue of a license or certificate of registration, to a company not incorporated by provincial authority, the company shall file in the office of the treasurer :

(a) A certified copy of the Act of incorporation, or other instrument of association of the company ;

(b) A power of attorney containing the matters hereinafter mentioned from the company to its chief officer or agent in the province, or some other person resident and doing business in the province, under the seal, if any, of the company, and signed by the president and secretary or other proper officer thereof, in the presence of a witness who shall make oath or affirmation as to the due execution thereof, and the official positions in the company held by the officers signing such power of attorney shall be sworn to or affirmed by some person cognizant of the facts necessary in that behalf. Whenever the company has, by such power of attorney under the seal of the company, thereof appointed a general agent for Canada and has thereby authorized such general agent to appoint chief officers or agents of the company in the various provinces of Canada, then after filing with the Provincial Treasurer a duplicate original of the said first mentioned document, powers of attorney executed by the said general agent for Canada under his seal, in the presence of a witness who has by oath or affirmation duly verified the execution thereof, shall be deemed sufficiently executed by the company for all the purposes of this Act.

(c) In the case of companies not licensed under "The Insurance Act of Canada," a statement of the condition and affairs of the company on the thirty-first day of December then next preceding, or up to the usual balancing day of the company (but such day shall not be more than twelve months before the filing of the statement), in such form as may be required by the treasurer.

Section 26. Such power of attorney shall declare at what place in the province the chief agency, head office or office of the attorney of the company is, or is to be established, and shall expressly authorize the attorney to receive service of process in all actions, suits and proceedings against the company in the province in respect of any liabilities incurred by the company therein, and shall declare that service of process for or in respect of such liabilities at the chief agency, or personally on the attorney, at the place where such chief agency, head office or office of the attorney is established shall be legal and binding on the company to all intents and purposes whatsoever.

Section 27. Whenever a company licensed or registered under this Act changes its chief agent, attorney, head office or chief agency in Manitoba, the company shall file a power of attorney as hereinbefore mentioned, specifying the change, and containing a similar declaration as to service of process as hereinbefore mentioned.

Section 28. Duplicates of such powers of attorney, duly verified as aforesaid,

shall be filed by the company at Winnipeg in the office of the prothonotary of the Court of Queen's Bench.

RECORD TO BE KEPT IN TREASURY DEPARTMENT.

Section 29. There shall be kept in the office of the treasurer a record of the several documents filed by every company under this Act, and under the heading of the company shall be entered the securities deposited on its account with the treasurer, naming in detail the several securities, their par value, and value at which they are received as deposited; and before the issue of a new license, or the renewal of a license to a company, the requirements of the law shall be complied with by the company, and the statement of its affairs must show that it is in a condition to meet its liabilities; and a record of the licenses and certificates of registration as they are issued or renewed shall also be kept in the office of the treasurer.

FEEES.

Section 30. Each company shall pay to the treasurer the following fees:—

(a) For recording and filing in the office of the treasurer the documents required by section 25, \$5.

(b) (*Repealed*).

(c) (*Repealed*).

(d) For initial license to do business, or renewal thereof,—

(1) In the case of a provincial company, \$100.

(2) In the case of any other company, except as hereinafter specified, \$200.

(e) For initial certificate of registration or renewal thereof, \$200.

(f) For initial license to do business, or certificate of registration or renewal thereof,—

(1) In the case of an inland marine insurance company, or of an accident or guarantee and surety company, \$25.

(2) In the case of licenses or certificates heretofore or hereafter taken out at a time in the calendar year later than the month of April, refunds may be made to the companies by the Provincial Treasurer in such proportions and according to such regulations as may be decided upon by the Lieutenant-Governor in Council.

(g) (*Repealed*).

SERVICE OF PROCESS.

Section 31. After such certified copies and power of attorney are filed as aforesaid, any process in any action, suit or proceeding against the company, in respect of any liabilities incurred in the province, may be served upon its attorney appointed pursuant to section 25 of this Act, and such service shall be deemed to be service on the company. Provided, however, that nothing herein contained shall render invalid service in any other mode in which the company may be lawfully served.

Sections 32 to 40 refer to "Change of Name and Head Office," "Books to be kept by Companies," and "Annual Statements."

Section 41. Every company licensed to do business by the Dominion shall annually file with the treasurer on the first day of January, or within three months thereafter, a certified copy of its annual statement furnished the Insurance Branch of the Department of Finance at Ottawa.

Sections 42 and 43 refer to "Cancellation of License."

Section 44. The suspension or cancellation or non-renewal of the license of any company, under "The Insurance Act of Canada," shall *ipso facto* in the respective cases operate as a suspension or cancellation of registry under the Act without notice from the treasurer; provided that, if the company's license shall be revived under "The Insurance Act of Canada," the Treasurer shall, on proof of such revival

and payment of the fee hereinbefore provided for, grant said company a new certificate of registration.

Sections 45 to 49 refer to "Liquidation."

PENALTIES.

Section 50. Any director, officer, agent, employee, or other person who, in contravention of section 4 of this Act undertakes or effects, or agrees or offers to undertake, or solicits any contract or collects any premium on behalf of any company, without the company being licensed or registered under this Act, or if such license or certificate of registration has been suspended or cancelled without renewal or revival thereof, shall be liable to a penalty of two hundred dollars for every such contravention of this Act.

Section 51. Any violation of section 38 to 41 of this Act shall subject the company violating same to a penalty of two hundred dollars for every violation, and to an additional sum of one hundred dollars for every month during which the company neglects to file such affidavits, statutory declarations and statements as are therein required; if such penalties are not paid, the Lieutenant-Governor in Council may order such company's license or certificate of registration to be suspended, or cancelled, as may be deemed expedient.

Section 52. Any penalty imposed by this Act, when recovered, shall belong to the province of Manitoba.

Section 53. All penalties imposed by this Act may be recovered by and before any police magistrate, or two justices of the peace; the information or complaint shall be laid or made in writing within one year from the commission of the offence, and the provisions of sections 839 to 909, both inclusive, of the Act of the Parliament of Canada, known as "The Criminal Code, 1892," and any amendments now or hereafter to be made to said sections of said Act, shall apply to the said proceedings.

Section 54. This Act shall come into force on the thirty-first day of December, A. D., 1894.

PLACE OF PAYMENT OF LIFE POLICY.

Section 55. The moneys payable under any policy of life assurance already issued or that may hereafter be issued by a company that has already obtained or may hereafter obtain a license or certificate of registration under the provisions of this Act, shall, in all cases be payable in this province when the assured resides therein, notwithstanding anything contained in any such policy or the fact that the head office of the company is not within this province.

THE FOREIGN CORPORATIONS ACT.

An Act Respecting Corporations incorporated out of Manitoba.

Being Chapter 2, of the Acts of the Legislative Assembly of the Province of Manitoba, 60 Vic.

SHORT TITLE.

1. This Act may be cited as "The Foreign Corporations Act."

LICENSES.

2. Any company, institution or corporation duly incorporated under the laws of Great Britain or Ireland or of the Dominion of Canada, or of the late province of Canada, or of any of the provinces of Canada, or of any State of the United States of

America, or of any other foreign state or country duly authorized to carry out or effect any of the purposes or objects to which the legislative authority of the Legislature of Manitoba extends, may obtain a license from the Lieutenant-Governor in Council authorizing it to carry on its business within the province of Manitoba on compliance with the provisions of this Act, and said company, institution or corporation shall thereupon have the same powers and privileges in Manitoba as if the same were incorporated under the provisions of a statute of the province of Manitoba; Provided, however, that the Lieutenant-Governor in Council may restrict such license in any manner that may seem desirable.

(2) This section shall not apply to, or in any way affect any company, institution or corporation incorporated and now existing or hereafter incorporated, the powers and objects of which are the acquiring, purchasing, holding and receiving property, real or personal, for the use or uses of any particular congregation or congregations, or mission station or stations in connection with any church or religious denomination, or the lending of money on the security of real or personal estate, and with or without interest, for the purchase or erection of churches, chapels, manses or personages and buildings connected therewith for the use or uses of any particular congregation or congregations, or mission station or stations, in connection with any church or religious denomination; and it shall not be necessary for any such company, institution or corporation to obtain a license authorizing or enabling it to exercise the powers or carry out the objects for which it has been or may hereafter be, incorporated or any of them; Provided, that if such company, institution or corporation desires to exercise any other powers than those mentioned in this sub-section, a license shall be necessary.

3. Any insurance company incorporated as provided in the second section of this Act, may, upon complying with the requirements of this Act, apply for and obtain a license under the provisions of this Act, empowering it to purchase real estate, and to loan and invest its moneys upon the securities set forth in this Act, to the extent permitted by the Act or charter of corporation of the company.

4. Any such license obtained by any such insurance company, within three months after the seventh day of July, in the year one thousand eight hundred and eighty-three, shall be deemed to have ratified and confirmed all previous acts of the company, and shall be construed as if such license had been granted before such company invested any money in this province: saving, however, all investments which, on the said seventh day of July, had been questioned by proceedings commenced in any court of law in this province.

DOCUMENTS TO BE FILED.

5. Before the issue of a license to any such company, institution or corporation, the company, institution or corporation shall file in the office of the Provincial Secretary (a) a certified copy of the act of incorporation or other instrument of association of the company; (b) an affidavit or statutory declaration that the said company, institution or corporation is still in existence, and legally authorized to transact business under its Act of incorporation, or other instrument of association; (c) a copy of the last auditor's report upon the finances of the company, institution or corporation; (d) a power of attorney containing the matters hereinafter mentioned from the company, institution or corporation to its chief officer or agent in the province or some other person resident and doing business in the province, under the seal, if any, of the company, institution or corporation, and signed by the president and secretary or other proper officers thereof, in the presence of a witness, who shall make oath or affirmation as to the due execution thereof. The official positions in the company, institution or corporation, held by the officers signing such power of attorney, shall be established by the oath or affirmation of some person cognizant of the facts.

6. Such power of attorney shall declare at what place in the province the chief agency, head office, or office of the attorney of the company, institution or corpora-

tion is, or is to be established, and shall expressly authorize the attorney to receive service of process in all actions, suits and proceedings against such company, institution or corporation in the province in respect of any liabilities incurred by the company, institution or corporation therein, and shall declare that service of process at the chief agency, or personally on the attorney at the place where such chief agency, head office, or office of the attorney is established, shall be legal and binding on such company, institution or corporation, to all intents and purposes whatsoever.

7. Whenever a company, institution or corporation licensed under this Act, changes its chief agent, attorney, head office or chief agency in Manitoba, the company, institution or corporation, shall file a power of attorney as hereinbefore mentioned, specifying the change, and containing a similar declaration as to service of process as hereinbefore mentioned.

NOTICE OF LICENSES.

8. Every company, institution or corporation obtaining such license as aforesaid shall forthwith give notice thereof in the *Manitoba Gazette*, and in at least one newspaper in the municipality, city or place where the chief agency, head office, or office of the attorney of the company, institution or corporation is, or is to be established, of which four insertions in said *Gazette* and newspaper respectively shall be sufficient, and such notice shall state the name of the attorney so appointed as aforesaid, and when a new attorney shall be appointed under the provisions of this Act the name of such new attorney, and the like notice shall be given when such company, institution or corporation shall cease to carry on business within this province.

REAL ESTATE.

9. No company, institution or corporation, not incorporated under the provisions of the statutes of this province and not having obtained a license under this Act, except those mentioned in subsection 2 of section 2 of this Act, shall be capable of taking, holding or acquiring any real estate within this province or of exercising the powers mentioned in section 11 of this Act.

10. Any such company, institution or corporation may, on obtaining a license under this Act, hold in perpetuity lands to the extent set forth in its license, or in any order that may be made by the Lieutenant-Governor in Council at any time after the issue of the license. This section shall apply to lands heretofore or hereafter acquired.

11. Such company, institution or corporation heretofore or hereafter licensed may take and hold any mortgages of real estate and any railway, municipal or other bonds of any kind whatsoever and on the security thereof may lend its money, whether the bonds form a charge on real estate within the province or not, and may hold such mortgage in its corporate name, and may sell and transfer the same at its pleasure and in all respects shall have and enjoy the same powers and privileges with regard to lending its money and transacting its business within the said province as a private individual might have and enjoy, so far as may be within its corporate powers and within the competence of the legislature of Manitoba to grant.

12. Any such company, institution or corporation, heretofore or hereafter licensed as aforesaid, shall be capable of taking, holding and acquiring in addition to the land specified in section 10 hereof, all such lands and tenements, real and personal estate, as may or shall have been *bona fide* mortgaged to such company, institution or corporation, by way of security for, or conveyed to it in satisfaction of debts previously contracted in the course of its business or purchased at judicial sales for such indebtedness, or acquired under tax sales or otherwise acquired or purchased for the purpose of avoiding a loss to the company, institution or corporation in respect thereof, or of the owner thereof. This section shall apply to lands

heretofore or hereafter acquired by any such company, institution or corporation heretofore or hereafter licensed as aforesaid.

FEES.

13. The fee for such license shall be such sum as may be fixed by the Lieutenant-Governor in Council.

EVIDENCE OF LICENSE.

14. A certificate under the hand of the Provincial Secretary of the issue of such license shall be received as *prima facie* evidence in all courts of justice and other tribunals, that such license has been duly issued, and is in force; and the Provincial Secretary shall furnish such certificate to any person on payment of a fee of one dollar.

REVOCATION OF LICENSE.

15. The Lieutenant-Governor in Council may at any time revoke any license granted under this Act or under any Act or Acts for which this Act has been substituted on account of the violation by any such company, institution or corporation of any of the provisions of this Act. Any such license so revoked shall be null and void as to any matter occurring subsequent to such revocation.

ANNUAL STATEMENT.

16. Every company, institution or corporation licensed under this Act shall annually transmit, on or before the fifteenth day of March in each year, to the Provincial Secretary, a statement in duplicate, verified by the oath of the principal agent for the province of Manitoba, setting forth the capital stock of the company, the amount of stock subscribed and the amount paid in upon such stock, and as to the business of the said company, institution or corporation in the province of Manitoba, the amount invested in mortgage, the estimated value of real estate under mortgage, the number of acres of farm lands under mortgage and such other details as the said Provincial Secretary may require; and the said statement shall be made up to the end of the last preceding fiscal year of the company's business.

REPEAL.

17. The Foreign Corporations Act, being chapter 24 of the Revised Statutes of Manitoba, and the Acts amending the same, namely, chapter 4 of 55 Victoria and chapter 5 of 56 Victoria, are hereby repealed. Licenses heretofore issued under the provisions of the said "The Foreign Corporations Act," or of any Act or Acts for which the same was wholly or partially substituted, shall be held to be continued in force as if issued under this Act.

18. This Act shall not apply to the corporation known as "The Governor and Company of Adventurers of England trading into Hudson's Bay."

54 Vic., cap. 106 (Man.) provides for the "Incorporation of Mutual Hail Insurance Companies," and 58 Vic., cap. 37 (Man.), 59 Vic., cap. 19 (Man.) and 60 Vic., cap. 23 (Man.) provide for the establishment of a "Municipal Hail Insurance" fund.

BRITISH COLUMBIA ENACTMENTS

THE FIRE INSURANCE POLICY ACT (B.C.)

Being chapter 12 of the Statutes of 1893, as amended by chapter 22 of the Statutes of 1895 (B.C.), and by chapter 20 of the Statutes of 1896 (B.C.)

An Act to secure Uniform Conditions in Policies of Fire Insurance.

1. This Act may be cited as the "Fire Insurance Policy Act, 1893."

2. Where, by reason of necessity, accident, or mistake, the conditions of any contract of fire insurance on property in this province, as to the proof to be given to the insurance company after the occurrence of a fire, have not been strictly complied with, or where, after a statement or proof of loss has been given in good faith, by or on behalf of the assured in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not, within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective and so from time to time, or where for any other reason the court or judge, before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof, or amended or supplemental statement or proof (as the case may be) shall, in any of such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before the coming into force of this Act.

3. The conditions set forth in the schedule of this Act shall, as against the insurers be deemed to be part of every contract, whether sealed, written, or oral, of fire insurance hereafter entered into or renewed or otherwise in force in British Columbia with respect to any property therein, or in transit therefrom or thereto, and shall be printed on every policy of fire insurance, with the heading "Statutory Conditions."

4. If a company or other insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added on the policy in conspicuous type, and in ink of different colour, words to the following effect:—

VARIATIONS IN CONDITIONS.

"This policy is issued on the above statutory conditions, with the following variations and additions:

"These variations (or as the case may be) are, by virtue of the British Columbia Statute in that behalf, in force so far as, by the court or judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company."

5. No such variation, addition or omission shall, unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, be legal and binding on the assured; and no question shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, but, on the contrary, the policy shall, as against the insurers, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid.

6. In case a policy is entered into or renewed containing or including any condition other than or different from the conditions set forth in the schedule to this Act, if the said condition so contained or included is held by the court or judge before whom a question relating thereto is tried, to be not just and reasonable, such condition shall be null and void.

7. A decision of a court or a judge under this Act shall be subject to review or appeal to the same extent as a decision by such court or judge in other cases.

8. (*Repealed.*)

Section 3 of 59 Vict., cap. 20, is as follows: "Section 8 of the "Fire Insurance Policy Act, 1893," is hereby repealed and the said Act as amended hereby and by the "Fire Insurance Policy Amendment Act, 1895," shall come into force on the 1st day of July, 1896."

SCHEDULE.

(SECTIONS 3 AND 6.)

STATUTORY CONDITIONS.

1. If any person or persons insures his or their buildings or goods and causes the same to be described otherwise than as they really are, to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

2. After application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application.

3. Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force.

4. If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession, or by the operation of the law, or by reason of death.

5. When property insured is only partially damaged, no abandonment of the same will be allowed unless by the consent of the company or its agent; and in case of the removal of property to escape conflagration, the company will contribute to the loss and expenses attending such act of salvage proportionately to the respective interests of the company or companies and the assured.

6. Money, books of account, securities for money, and evidences of debt or title are not insured.

7. Plate, plate-glass, plated ware, jewelry, medals, paintings, sculptures, curiosities, scientific and musical instruments, bullion, works of art, articles of vertu, frescoes, clocks, watches, trinkets, and mirrors are not insured unless mentioned in the policy.

8. The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected.

9. In the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage without reference to the dates at the different policies.

10. The company is not liable for the losses following, that is to say :—

(a) For loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy.

(b) For loss caused by invasion, insurrection, riot, civil commotion, military or usurped power.

(c) Where the insurance is upon buildings or their contents—for loss caused by the want of good and substantial brick or stone chimneys, or by ashes or embers being deposited, with the knowledge and consent of the assured, in wooden vessels ; or by stoves or stove-pipes being to the knowledge of the assured in an unsafe condition or improperly secured.

(d) For loss or damage to goods destroyed or damaged while undergoing any process in or by which the application of fire heat is necessary.

(e) For loss or damage occurring to buildings or their contents while the buildings are being repaired by carpenters, joiners, plasterers or other workmen, and in consequence thereof, unless permission to execute such repairs had been previously granted in writing, signed by a duly authorized agent of the company. But in dwelling houses fifteen days are allowed in each year for incidental repairs, without such permission.

(j) For loss or damage occurring while petroleum, rock, earth or coal oil, camphene, gasoline, burning fluid, benzine, naphtha, or any liquid products thereof, or any of their constituent parts (refined coal oil for lighting purposes only, not exceeding twenty gallons in quantity, or lubricating oil, not being crude petroleum nor oil of less specific gravity than required by law, for illuminating purposes, not exceeding twenty gallons in quantity, excepted) or more than twenty-five pounds weight of gunpowder is or are stored or kept in the building insured or containing the property insured, unless permission is given in writing by the company.

11. The company will make good loss caused by the explosion of coal-gas in a building not forming part of gas works, and loss by fire caused by any other explosion or by lightning.

12. Proof of loss must be made by the assured, although the loss be payable to a third party.

13. Any person entitled to make a claim under this policy is to observe the following directions :

(a) He is forthwith after loss to give notice in writing to the company.

(b) He is to deliver as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits.

(c) He is also to furnish therewith a statutory declaration, declaring :

(1) That the said account is just and true ;

(2) When and how the fire originated, so far as the declarant knows or believes ;

(3) That the fire was not caused through his wilful act or neglect, procurement, means or contrivance ;

- (4) The amount of other insurances ;
- (5) All liens and encumbrances on the subject of insurance ;
- (6) The place where the property insured, if movable, was deposited at the time of the fire.

(d) He is, in support of his claims, if required and if practicable, to produce books of account, warehouse receipts, and stock lists, and furnish invoices and other vouchers, to furnish copies of the written portion of all policies, to separate as far as reasonably may be the damaged from the undamaged goods, and to exhibit for examination all that remains of the property which was covered by the policy.

(e) He is to produce, if required, a certificate under the hand of a government agent, magistrate, notary public, commissioner for taking affidavits, or municipal clerk, residing in the vicinity in which the fire happened, and not concerned in the loss or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has by misfortune and without fraud or evil practice, sustained loss and damage on the subject assured, to the amount certified.

14. The above proofs of loss may be made by the agent of the assured, in case of the absence or inability of the assured himself to make the same, such absence or inability being satisfactorily accounted for.

15. Any fraud or false statement in a statutory declaration in relation to any of the above particulars shall vitiate the claim.

16. If any difference arises as to the value of the property insured, of the property saved, or amount of the loss, such value and amount and the proportion thereof (if any) to be paid by the company, shall, whether the right to recover on the policy is disputed or not, and independently of all other questions, be submitted to the arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then to two persons, one to be chosen by the party assured, and the other by the company, and a third to be appointed by the persons so chosen, or on their failing to agree, then by a judge of the Supreme Court of British Columbia, or the county judge of the county wherein the loss has happened ; and such reference shall be subject to the provisions of the laws applicable to references in actions ; and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and proportion to be paid by the company ; where the full amount of the claim is awarded the costs shall follow the event ; and in other cases, all questions of costs shall be in the discretion of the arbitrators.

17. The loss shall not be payable until thirty days after completion of the proofs of loss, unless otherwise provided for by the contract of insurance.

18. The company, instead of making payment, may repair, rebuild or replace, within a reasonable time, the property damaged or lost giving notice of their intention within fifteen days after the receipt of the proofs herein required.

19. The insurance may be terminated by the company by giving written notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium for the unexpired term, calculated from the termination of the notice ; five days' personal service of the notice, excluding Sunday, shall be given. And the policy shall cease after such tender and notice aforesaid, and the expiry of the five days.

(a) The insurance, if for cash, may also be terminated by the assured by giving written notice to that effect to the company, or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid.

20. No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company, unless the waiver is clearly expressed in writing, signed by an agent of the company.

21. Any officer or agent of the company, who assumes on behalf of the company

to enter into any written agreement relating to any matter connected with the insurance, shall be deemed *prima facie* to be the agent of the company for the purpose.

22. Every action or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred, unless commenced within the term of one year next after the loss or damage occurs.

23. Any written notice to a company for any purpose of the statutory conditions, when the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in British Columbia, or by registered post letter addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorized agent of the company.

The Amending Act, 58 Vic., cap. 22, as amended by 59 Vic., cap. 20, contains the following additional section :

4. Where the loss (if any) under any policy has, with the consent of the company, been made payable to some person or persons or company other than the assured as mortgagee or mortgagees, said policy shall not be cancelled, altered, or otherwise dealt with by the company upon the application of the assured, and in any case not without reasonable notice to the said mortgagee or mortgagees.

(a) In cases where the loss under any policy is with the consent of the company made payable to a mortgagee or mortgagees, proof of loss under any such policy may be made by such mortgagee or mortgagees.

RULES AND REGULATIONS REGARDING THE ACCEPTANCE OF SECURITIES OFFERED FOR DEPOSIT BY INSUR- ANCE COMPANIES, &c., &c.

The following extracts from Orders in Council, Minutes of the Treasury Board, &c. (almost all of which have been previously published) are collected for convenience of reference: ¹

Municipal Securities.—"The Board recommend that municipal bonds, when accepted, may be taken at 90 per cent.; and that Montreal Harbour bonds be placed on the same footing." (O. C., 1st April, 1876.)

Particulars of Securities offered for Deposit.—"All applications for the acceptance of bonds or debentures, whether as original deposits or in exchange for securities which the applicants desire to have released, must be accompanied by a statement giving full particulars of the securities offered for acceptance under the following headings, viz. :-

"Date, date of maturity, place of payment of principal, rate of interest, how payable, *i. e.*, yearly or half-yearly, date and place of payment of interest, market value at time of application for acceptance, and, if not quoted in the market, the price at which purchased by the company and date of such purchase.

"Also, as regards municipalities whose bonds or debentures are offered :

"The population, assessed value, rate of taxation, assets, total debenture indebtedness, and all other liabilities, income and expenditure for the last fiscal year,

¹ Report of Superintendent of Insurance for 1896, page 24.

and any other details in the possession of the company which would be of assistance in determining the value of the securities offered for acceptance.

"The Board desire to be in possession of all possible information in relation to such securities in order that they may be in a position to give the matter proper consideration." (T. B., Nov. 9, 1888.)

Railway Debentures.—"The Board are of opinion that they cannot accept as a deposit, the bonds of any railway company, unless guaranteed directly or indirectly by the Canadian Government." (T. B., Oct. 27, 1890.)

Loan Companies' Bonds.—"The Board had under consideration a memorandum from the Superintendent of Insurance with reference to the application of the Land Mortgage Companies' Association of the province of Ontario to have the debentures of loan companies accepted by the Government as deposits on behalf of insurance companies, in which he reports that the said Association is composed of incorporated loan companies or societies authorized to lend money on real estate in the province of Ontario, and all such companies or societies are eligible for membership upon payment of certain fees; that the loan companies which compose the said Association may be divided into the following classes:

I. Companies incorporated under the provisions of the Statute of the province of Canada, 9 Victoria, cap. 90, consolidated in chapter 53 of the Consolidated Statutes of Upper Canada, now included in chapter 160 of the last Revised Statutes of Ontario (1887), and commonly known as the Building Societies' Act.

II. Companies incorporated under the "Canada Joint Stock Companies' Act, 1887," now known as the "Companies' Act," being chapter 119 of the Revised Statutes of Canada (1886).

III. Companies incorporated under special Acts of the Legislature of the province of Canada or of the Parliament of the Dominion of Canada.

IV. Companies incorporated under the "Ontario Joint Stock Companies' Letters Patent Act, 1874," being chapter 150 of the former and chapter 157 of the last Revised Statutes of Ontario.

V. Companies incorporated under the English Companies' Act, and licensed to transact business in Canada under 37 Victoria, chapter 49, being chapter 125 of the Revised Statutes of Canada.

The Board, after careful consideration of the report of the Superintendent of Insurance as to the class of securities upon which the above companies can invest their funds, and as to the borrowing powers of the said companies, direct that the debentures and debenture stock of such companies, belonging to the said association, as meet the requirements hereinafter set forth, may be accepted as deposits on behalf of insurance companies, at such rate as the Treasury Board may see fit to place upon them, not, however, to exceed the value usually placed upon municipal securities, viz., 90 per cent. of the par value thereof when the market value is at least equal to such par value, or 90 per cent. of the market value, when the market value is less than the par value.

The requirements above referred to are as follows:—

1. The company shall have kept strictly within the powers in relation to borrowing and investment conferred upon it by the Act under which it is incorporated.
2. It shall have a paid-up capital of at least \$500,000.
3. It shall have been in successful operation as a loan company for not less than ten years.
4. It shall have a reserve fund amounting to not less than 25 per cent. of its paid-up capital.
5. Its stock shall have a market value of not less than par.

The Board also direct that every application on behalf of an insurance company for the acceptance of any such debenture or debenture stock as herein above provided, shall form the subject of a special reference to the Treasury Board, and that the company shall supply, for the information of the Board, all necessary particulars, including a statement of the borrowing powers and powers of investment of

the loan company whose securities are offered as a deposit, and a statement showing in detail the nature of the investments of such loan company, all properly verified. (T. B., 16th October, 1896).

No assurance of acceptance of Bonds by the Treasury Board.—"The Superintendent asks the decision of the Board upon the following question, viz.:

'Will the Board inform a company desirous of purchasing certain bonds or securities whether they will be accepted or not as a deposit in the event of their being purchased?'

* * * * *

"The Board, after deliberation, are of opinion that they cannot give any assurance to any company that securities will or will not be accepted in the event of their being purchased." (T. B., 1st April, 1889).

Deposit Receipts.—"The Board direct that deposit receipts be not accepted in any case as a deposit on behalf of any company." (T. B., 25th January, 1888).

Bank Stock, &c.—"Bank stock or shares in any private company will not be accepted." (O. C., 17th January, 1876).

Registered Bonds as Deposits.—When registered bonds are received as deposits they must be registered in the name of the Receiver General. Bonds registered in the name of a company, accompanied by an assignment in favour of the Receiver General, will not be accepted. When registered bonds are intended to be used as a deposit, they should, before being forwarded to this department, be registered thus—in the name of "the Receiver General of Canada in trust for (*giving the name of the company*), being part of the deposit made by the company with said Receiver General in pursuance of the statutes of Canada in that behalf." (T. B., 13th July, 1891).

Foreign Municipal Securities.—"The Board are of opinion that no municipal securities other than Canadian should be accepted for deposit under the Insurance Act." (T. B., 13th January, 1894).

Under the heading of "LOSSES OUTSTANDING," the Superintendent of Insurance has made some comment (Report for 1892) for the information of those officers of licensed companies whose duty it is to prepare the annual statements for his department. Observation has proved, he states, that the requirements of the Insurance Act are not fully understood, or if understood, are disregarded, and as a consequence, the statutory returns are frequently found to be inaccurate, and perhaps in no particular are there greater inaccuracies than are to be found regarding the losses outstanding at the close of the companies' year. The inaccuracies are principally of two kinds, firstly, claims for losses which have occurred before the close of the year, and which should have been reported are frequently omitted from the statement altogether, and such reasons as the following are assigned for such omission, viz., that such losses were not reported to the company until after the close of the year, or that although they were reported and claims made therefor, such claims were not looked upon as valid claims, were not recognized or admitted as liabilities, and were therefore disregarded in the companies' statement. Such reasons are wholly insufficient. The mere fact that a loss had not been reported, or was not known to a company at the close of the year, but which loss at the time the statement was prepared and sent to the department was known to have existed at such close, affords but a poor excuse for asserting that it did not exist. Again, it is not permissible for a company to disregard a claim for a loss, upon the ground that the company looked upon the claim as invalid. The statute in schedule A defines the liabilities of a life company, which are to be reported, and amongst them are included "Claims for death losses and matured endowments and annuity claims due and unpaid or in process of adjustment, or adjusted but not due, or resisted." In like manner schedule B, includes among the liabilities of a fire company which are to be reported, "Amount of claims for losses resisted by the company, distinguishing those in suit," the plain meaning of which is, that every claim for a loss should be reported, even though the company may have a good legal defence to an action therefor. To adopt any other course would in effect constitute the officers of the companies' judges and enable them by denying liability for all existing claims, to present a report showing no outstanding losses, and that at a time when every claim might prove valid, notwithstanding the companies' denial of such validity.

Secondly, claims for losses which should be reported as 'resisted, in suit, or resisted, not in suit' are not infrequently reported as unadjusted but not resisted. A plausible explanation of such an inaccuracy is rarely found, but one sometimes offered is, that at the close of the year the company had not decided to resist the claim. Such an excuse is wholly inadequate. The statute allows two months within which to obtain full and accurate information regarding such matters.

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ADDENDA ET ERRATA.

Page 39 for "§ 24 f." read "25 f."

- " 66, § 35, add "There is an Inspector of Mutual Insurance Companies for the Province of Quebec, whose office is in Montreal."
- " 189 for second reference 3, read 3a.
- " 236, § 191a, insert reference to foot note 2 at end of this paragraph and in foot note, and add after foot note "and see Guerin and Manchester Ins. Co. R. J. Q. 5 Q. B. 434."
- " 237, § 192, middle of page read "on behalf of owner or mortgagor."
- " 254, § 209d, for reference note 9 read note 2.
- " 268, § 213, and page 275, § 221, add: "Since this work went to press the Quebec Legislature has passed an Act allowing the transfer of an appropriated policy by the insured and parties benefited, if of age."
- " 277, foot note 2, for "infra § 229a" read "239a."
- " 341, do 4, for "infra § 282b," read "§ 282."
- " 349, do 6, do do do
- " 357, do 2, for "§ § 374 and 455" read "§ § 282a, 322, 323."
- " 359, do 3, for "§ § 249a and 363" read "§ § 249a, 259, 306."
- " 439, do 4, add "15 Moore's P. C. Rep. 516."
- " 466, do 2, read "L. C. J." instead of "Q. C. J."
- " 468, do 1, read "L. C. J." instead of "C. J."
- " 474, § 302, after "specific policies" insert reference to foot note 1.
- " 477, § 304, add to foot note 5: case of Prentice v. Steele, M. L. R. 5 S. C. 294, holding that assignment of a life policy is governed by the law of place where assignment is made, and not of place where policy was issued, or where it is payable.
- " 494, reverse foot notes 1 and 2.
- " 498, foot note 2, for "1 R. S. C." read "1 R. & G."
- " 516, § 328, after "to take the account" insert reference to foot note 1.
- " 517, for § 380, read 330.
- " 558, after "valid in all cases" insert reference to foot note 1 and after "cannot be recovered" insert reference to foot note 3.
- " 603, foot note 1, for "Rev." read "Rev. Leg."
- " 611, last foot note, number this "1" before "Montreal, 3rd May, 1897."
- " 616, insert as heading before "By the 17th condition:" "374. Time for payment of loss."
- " 626, foot note 4, add as reference for Pacaud case, "21 L. C. J. 111."
- " 667, § 398, after "should be affirmed" insert reference to foot note 3.
- " 675, § 403, for "Superior Court of Canada" read "Supreme Court of Canada."

Index of cases, page XXIV., Pacaud v. Monarch Ins. Co., read page 468, instead of 46.

Ex. J. H.

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